No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

STANLEY REINISH and CAROL REINISH, individually and on behalf of all others similarly situated,

Petitioners,

v.

JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County, Florida and as representative of other county tax collectors in the State of Florida, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In determining whether a state real estate tax exemption is discriminatory, in violation of the United States Constitution, should the court compare nonresident taxpayers who are ineligible for the exemption to residents who are also ineligible, or should the court compare nonresident taxpayers who are ineligible to state residents who do receive the benefit of the exemption?

2. Does the Privileges and Immunities Clause prohibit a state real estate tax exemption which can be claimed by any state resident for one piece of residential property but can never be claimed by any nonresident homeowners?

3. Does the dormant Commerce Clause prohibit a state real estate tax exemption which can be claimed by any state resident for one piece of residential property but can never be claimed by any nonresident homeowners?

4. Whether state tax provisions which are alleged to discriminate against nonresidents should be scrutinized more closely under the Equal Protection Clause than state tax provisions which differentiate between two groups of residents?

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

1. Stanley Reinish, individually and on behalf of all others similarly situated, Plaintiff/Petitioner.

2. Carol Reinish, individually and on behalf of all others similarly situated, Plaintiff/Petitioner.

3. John K. Clark, in his official capacity as Tax Collector of Palm Beach County, Florida and as representative of other county tax collectors in the State of Florida, Defendant/Respondent.

4. Gary Nikolis, in his official capacity as Property Appraiser of Palm Beach County, Florida, Defendant/Respondent.

5. L. H. Fuchs, in his official capacity as Executive Director of the Florida Department of Revenue, Defendant/Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Stanley and Carol Reinish, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida in this case.

OPINIONS BELOW

The opinion of the District Court of Appeal, First District, State of Florida is reported, *Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000). *See* Appendix ["App."] at 1. The Supreme Court of Florida denied the Reinishes' Petition for Review on April 23, 2001. *Reinish v. Clark*, No. SC00-1703, 2001 Fla. LEXIS 956 (Fla. Apr. 23, 2001). *See* App. at 42.

The opinion of the trial court, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, is unreported. It is reproduced in the Appendix at 35-39.

JURISDICTION

The Supreme Court of Florida issued an Order denying the Reinishes' Petition for Review, which sought discretionary review of the District Court of Appeal's opinion, on April 23, 2001. *Reinish v. Clark*, No. SC00-1703, 2001 Fla. LEXIS 956 (Fla. Apr. 23, 2001). *See* App. at 42.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

1. The Privileges and Immunities Clause: "The Citizens of each State shall be entitled to all Privileges and

Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

2. The Commerce Clause: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . . " U.S. Const. art. I, § 8, cl. 3.
3. The Equal Protection Clause: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.
4. Fla. Const. art. VII, § 4(C). Reproduced in App. at 45-47.
5. Fla. Const. art. VII, § 6. Reproduced in App. at 47-49.
6. Fla. Stat. § 196.012(17). Reproduced in App. at 49.
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8. Fla. Stat. § 196.015. Reproduced in App. at 50-51.
9. Fla. Stat. § 196.031. Reproduced in App. at 51-54.

STATEMENT OF THE CASE

Petitioners challenge Fla. Const. art. VII, § 6, and Fla. Stat. § 196.031 [Florida's "Homestead Tax Exemption"],[1] because the Homestead Tax Exemption granted by those provisions is available only to permanent residents of Florida, in violation of art. I, § 8, cl. 3 of the United States Constitution (the Commerce Clause), art. IV, § 2, cl. 1 of the United States Constitution (the Privileges and Immunities Clause), and the Fourteenth Amendment to the United States Constitution (the Equal Protection Clause).

[1] The Florida Homestead Tax Exemption exempts the first $25,000 of the assessed value of real estate that is owned by a permanent resident as a residence from real estate *ad valorem* taxation. The constitutional provision is reproduced in App. at 47-49, and the statute is reproduced in App. at 51-54.

Second Amended Complaint ["Second Am. Compl."], ¶ 2 (App. at 56).[2]

Petitioners, Stanley and Carol Reinish, are residents of Chicago, who rent an apartment and receive no Illinois homestead exemption. Transcript, p. 13 (App. at 82-83). In September 1994, the Reinishes purchased a residence in Ocean Ridge, Palm Beach County, Florida, which they occupy four to five months per year. Second Am. Compl., ¶ 4 (App. at 57). Because the Reinishes admittedly are not permanent residents of Florida, they are ineligible for the Homestead Tax Exemption,[3] so they have paid taxes on their Ocean Ridge property in the full amount, without the benefit of the Homestead Tax Exemption and without the benefit of the "Save Our Homes" provision.[4] The Reinishes seek a refund of the portion of the residential real estate taxes paid by them, and by the class they seek to represent, which they would not have been required to pay if the Homestead Tax Exemption had been available to them. Second Am. Compl., prayers for relief (App. at 64-65, 66, 67).

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[2] Florida's Debtor Homestead Exemption, Fla. Const. art. X, § 4, which exempts homesteads from seizure for most types of debt, is not affected by this case. *See generally Havoco v. Hill*, No. SC99-98, 2001 WL 690070 (Fla. June 21, 2001). The instant case concerns only Florida's Homestead Tax Exemption, *see* n.1, above.

[3] *See* Fla. Stat. § 196.012(18) (App. at 49-50).

[4] The "Save Our Homes" provision, Fla. Const. art. VII, § 4(C), limits annual increases in the assessed value of homestead-exempt property to the lesser of 3% of the assessed value of the property or the increase in the Consumer Price Index. It is challenged in ¶ 21 of the Second Amended Complaint (App. at 62) and is reproduced in App. at 45-46.

The Reinishes filed their initial complaint in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, against the Tax Collector of Palm Beach County and other defendants. On January 2, 1998, the Reinishes filed a Second Amended Complaint (reproduced in App. at 55-68), naming as Defendants: John K. Clark, in his official capacity as Tax Collector of Palm Beach County and as representative of other tax collectors in the State of Florida; Gary Nikolis, the Property Appraiser of Palm Beach County; and L. H. Fuchs, in his official capacity as Executive Director of the Florida Department of Revenue. Defendant Fuchs filed a Motion to Dismiss, asserting, *inter alia*, lack of venue, which was granted in part by an agreed order to transfer venue to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida.

Judge Davey of the Second Judicial Circuit conducted a hearing on the remaining issues on May 15, 1998, *see* Transcript ["Tr."] (App. at 73-98), and rendered a Final Order dated August 24, 1998. (App. at 39.) In that Final Order, Judge Davey rejected Defendants' assertion that Plaintiffs, in order to bring this suit, were required to apply for a homestead exemption pursuant to Fla. Stat. § 196.011, and to challenge their assessment within 60 days of the certification of the tax roll, pursuant to Fla. Stat. § 194.171. *See* Tr., pp. 8, 28 (App. at 79, 94-95). Judge Davey did, however, reject Plaintiffs' constitutional claims and granted Defendants' motion to dismiss for failure to state a claim. *See* Tr., p. 30 (App. at 96). Plaintiffs filed a motion for rehearing, which was denied on September 30, 1998. (App. at 40-41.)

Plaintiffs' Notice of Appeal to the District Court of Appeal, First District, State of Florida ["the First District"] was timely filed on October 20, 1998, and Defendant Fuchs filed a Notice of Cross-Appeal on the issue of Plaintiffs' standing.

The First District's Opinion affirmed the trial court's ruling that the Reinishes had standing to bring the action. *Reinish v. Clark*, 765 So. 2d 197, 201-03 (Fla. Dist. Ct. App. 2000) (App. at 3-7). The First District also affirmed the trial court's ruling against the Reinishes on the merits of their constitutional claims, and affirmed the dismissal of the complaint with prejudice. *Id.* at 203-15 (App. at 8-34).

Defendants sought discretionary review, by the Florida Supreme Court, of the lower courts' rulings that Plaintiffs had standing to bring this action. The Florida Supreme Court, at Defendants' request, dismissed Defendants' Petition for Review on October 18, 2000. (App. at 42.)

The Reinishes sought discretionary review on the merits of the First District's decision in the Florida Supreme Court, and that court denied Plaintiffs' Petition for Review on April 23, 2001. (App. at 43.)

The federal questions sought to be reviewed by this Petition were directly and expressly raised in the trial court in the Second Amended Complaint. *See* Second Am. Compl., ¶¶ 2, 10, 20-33 (App. at 56, 58, 61-67). That Second Amended Complaint was dismissed by the trial court. (*See* App. at 39.)

The trial court acknowledged that Plaintiffs had claimed violations of the Commerce Clause, the Privileges and Immunities Clause and the Equal Protection Clause; expressly held that Florida's Homestead Tax Exemption "does not violate the Commerce Clause"; and

expressly "rejected" all of "Plaintiffs' constitutional claims." *See* Final Order Dismissing Plaintiffs' Second Amended Complaint With Prejudice, [Finding of] Fact 6 and Conclusions of Law 14 and 16 (App. at 36, 38-39). *See also* Order Denying Rehearing at 1 (App. at 40) (expressly rejecting Plaintiffs' Equal Protection claim and noting that the court had previously "considered each of Plaintiffs' constitutional theories and rejected them.").

In the District Court of Appeal, First District, State of Florida, the federal questions sought to be reviewed were directly and expressly raised in all of Plaintiffs'/Appellants' briefs. The entirety of the First District's opinion analyzes the federal questions sought to be reviewed here and specifically rejects Plaintiffs' federal claims. *See Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000) (App. at 1-34).

SUMMARY OF THE ARGUMENT

This case involves a challenge to Florida's Homestead Tax Exemption based upon the Privileges and Immunities Clause, dormant Commerce Clause, and Equal Protection Clause of the United States Constitution. The Florida First District Court of Appeal wrongly compared the Reinishes, nonresidents who are not eligible for the Homestead Tax Exemption on the residential property they own in Florida, to subgroups of Florida residents who are also ineligible for the Homestead Tax Exemption. The First District's erroneous comparison is in conflict with the approach required by this Court and correctly followed by state courts of last resort in cases involving challenges to discriminatory state taxes. That established

approach requires a comparison between those nonresidents taxpayers who are not eligible for the tax exemption (because of their nonresident status) to those residents who do receive the benefit of the challenged tax exemption. *See, e.g., Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998); *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 217-18 (1984); *City of New York v. State*, 94 N.Y.2d 577, 593, 730 N.E.2d 920, 928 (2000).

The Homestead Tax Exemption provides substantial benefits for residents only, while denying benefits to nonresidents like the Reinishes and the class they seek to represent. The Homestead Tax Exemption (in conjunction with the accompanying "Save Our Homes" provision) substantially reduces the ownership costs of Florida residential real property. The State has demonstrated no justification, let alone the substantial justification required by this Court's modern Privileges and Immunities Clause decisions and relevant decisions of state courts, for this radical disparity in treatment. *See, e.g., Lunding*, 522 U.S. 287; *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *City of New York*, 94 N.Y.2d 561, 730 N.E.2d 920.

The ruling by the court below is also in conflict with numerous dormant Commerce Clause decisions issued by the courts of last resort in other states, *see, e.g., City of New York*, 94 N.Y.2d 561, 730 N.E.2d 920; *General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561 (Mo. 1998), and recently issued by this Court. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

In rejecting the Reinishes' Equal Protection claim, the court below incorrectly concluded that there was no violation because Florida homeowners who purchase a second piece of Florida residential property are ineligible for the Homestead Tax Exemption for that second property. *See Reinish v. Clark*, 765 So. 2d 197, 203-07 (Fla. Dist. Ct. App. 2000) (App. at 8-16). As stated above, under this Court's established jurisprudence the proper comparison is between the Reinishes, who can never obtain a homestead exemption, and their Florida-resident neighbors, who, simply because they are Florida residents, can obtain a homestead exemption for an identical piece of real property in Ocean Ridge, Florida. Though this Court's analysis of Equal Protection Clause challenges to business regulations is generally deferential to the states, the Court has reacted strongly – and negatively – to taxes that discriminate against nonresidents. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *Williams v. Vermont*, 472 U.S. 14, 23 (1985).

The discrimination imposed by Florida's Homestead Tax Exemption raises important federal questions which have been resolved by the court below in a manner which conflicts with the decisions of this Court and courts of last resort in various states. Granting this Petition would give this Court the opportunity to clarify, for the benefit of Florida and the other states that employ comparable discriminatory homestead tax exemptions, that such tax benefits cannot be based upon the residency status of the taxpayer.

REASONS FOR GRANTING THE PETITION

A. By Determining That the Challenged Tax Exemption Did Not Discriminate Against Nonresidents, the Florida Court's Opinion Created a Conflict With Decisions of This Court and of Other State Courts, Because the Court Below Wrongly Compared Nonresidents Who Are Ineligible For the Homestead Tax Exemption With Some Florida Residents Who Are Also Ineligible For the Exemption, Instead of Comparing the Nonresidents With Residents Who Do Receive the Benefit.

The one central, undisputed factual and legal conclusion in this case is that any Florida resident who owns residential property can obtain one homestead tax exemption, while no nonresident can possibly obtain such an exemption.[5] This fact and conclusion should have been the starting point for the Florida First District Court's analysis of the Reinishes' federal constitutional challenges to Florida's Homestead Tax Exemption. Instead, the First District wrongly compared the Reinishes and the class they seek to represent (nonresident owners of Florida residential property, who are ineligible for the tax exemption) to subgroups of Florida residents who are also ineligible. *See, Reinish*, 765 So. 2d at 205 (App. at 12) (rejecting Equal Protection Clause claim, because "the Florida exemption treats the Reinishes no differently from either Florida residents who rent, rather

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[5] The First District conceded as much: "As a practical matter, those persons who are eligible to receive the homestead tax exemption will be Florida residents, for they are the taxpayers who have permanent residences in this state." 765 So. 2d at 208.

than own, a particular Florida real-estate parcel, or Florida residents who use Florida real property as a secondary, seasonal, or vacation residence."); *see also id.* at 208-10 (App. at 19-23) (rejecting Privileges and Immunities Clause claim, because although "the Reinishes are nonresidents, their Florida real property is treated the same as any vacation or seasonal homes of Florida residents, who are taxed upon the full value of those properties."); *id.* at 214 (App. at 31) (rejecting Commerce Clause claim for same reason).

The Florida court's skewed comparison is in direct conflict with this Court's established pattern of analyzing constitutional challenges to state tax laws by comparing the discrepancy in treatment between those residents who receive the benefit of the challenged tax law and those nonresidents who would qualify for the benefit but are denied it because of their nonresident status. *See, e.g., Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 314 (1998); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997); *Toomer v. Witsell*, 334 U.S. 385 (1948). Indeed, in *Lunding*, this Court specifically rejected attempts to draw "fairness" comparisons between the nonresident petitioner's tax liability and that of various hypothetical pairs of resident taxpayers, explaining that "[t]ax provisions imposing discriminatory treatment on nonresident individuals must be reasonable in effect and based on a substantial justification other than the fact of nonresidence." *Lunding*, 522 U.S. at 314.[6] *See also United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 217-18 (1984) (fact that some in-state residents might also

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[6] Further, because the Reinishes are renters in Illinois and do not have the benefit of a homestead tax exemption in Illinois, any attempt at a "fairness" argument must fail here.

be disadvantaged by a state protectionist law cannot serve as a defense or justification of that law's discrimination against nonresidents).

A review of this Court's other key tax decisions further demonstrates the direct conflict between the approach taken by the Florida court and the approach required by this Court. Considering a Privileges and Immunities challenge in *Toomer*, this Court compared nonresident shrimpers, who paid $2,500 for a license, to shrimpers residing in South Carolina, who paid $25 for the same license. It did not compare the burdened nonresident shrimpers to all South Carolina residents (many of whom did not engage in commercial shrimping and, therefore, did not benefit from the lower-priced in-state licenses). *See Toomer*, 334 U.S. at 395-97. *See also Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (invalidating residency requirement for bar admission, on Privileges and Immunities Clause grounds, after comparing nonresidents who had passed the bar exam to residents who had passed it).

Similarly, this Court's Equal Protection analysis in *Ward*, 470 U.S. 869 (1985), compared out-of-state insurance companies which paid a higher tax rate when doing business in Alabama, to resident Alabama insurance companies which had the benefit of a lower tax rate. It did not compare the tax-burdened, out-of-state insurance companies to Alabama companies engaged in other enterprises, which might have paid an even higher tax rate. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), compared out-of-state dairy farmers who paid the tax but received no dairy subsidy to Massachusetts dairy farmers who paid the tax and received the subsidy. It did not compare the out-of-state dairy farmers to Massachusetts

farmers generally, many of whom did not receive a dairy subsidy. *See also Austin v. New Hampshire*, 420 U.S. 656, 668 (1975) (invalidating New Hampshire's Commuter Income Tax).

The Florida court's misdirected comparison also conflicts with the approach taken in decisions by other state courts of last resort. In its Privileges and Immunities Clause and dormant Commerce Clause analysis of the differential burden of the New York City commuter income tax, the New York Court of Appeals compared nonresidents of New York State who commuted to work in New York City and had to pay the commuter tax, to residents of New York State who also commuted to work in New York City but were exempted from the commuter tax. It did not compare the plaintiffs, out-of-state commuters, to the State residents who lived and worked in New York City and, therefore, paid an even higher income tax. *City of New York v. State*, 94 N.Y.2d 577, 730 N.E.2d 920 (2000). As the *City of New York* court made clear, "[t]he 'substantial equality' of the [challenged] tax is measured by the impact of the tax on nonresident[s] and residents and does not employ a determination of each group's relative tax burdens." 94 N.Y.2d at 593, 730 N.E.2d at 928. *See also Borden v. Selden*, 259 Iowa 808, 819, 146 N.W.2d 306, 314 (1966) ("We are not impressed by the argument that some land owners in the county pay more with the [challenged agricultural land tax] credit than a nonresident plaintiff pays without the credit. . . . The comparison, to be accurate, must be made with resident taxpayers within the same school district."); *Opinion of the Judges*, 81 S.D. 629, 632, 140 N.W.2d 34, 35-36 (1966) (Giving real estate tax relief only to state residents would violate the Privileges and Immunities Clause, because it

is "based solely upon residence, and to the extent of the credit or refund imposes a higher tax upon the citizens of other states than is imposed on our own.").

The obvious point which emerges from these cases is that a court, confronted with a claim that a state tax unconstitutionally discriminates against nonresidents, must compare the discriminated-against, tax-burdened nonresidents to those residents who benefit from the challenged tax law (even if that is not the full universe of residents and nonresidents). That is, courts must look at those who are most burdened by the challenged tax law, on the nonresidents' side, and then compare them to those who are most benefitted by the challenged law, on the residents' side (provided both groups are similarly situated with respect to all characteristics other than residence). The fact that some nonresidents might receive some benefits from the challenged tax scheme (which is not true in our case) or that some (or even many) residents might receive no benefits does not matter. As *Lunding, Toomer, Ward, West Lynn Creamery,* and *City of New York* demonstrate, this comparison between discriminated-against outsiders and benefitted insiders is woven into the fabric of the law of discriminatory state taxation.

Therefore, the First District's erroneous comparison is in conflict with the approach required by this Court and correctly followed by state courts of last resort in cases involving challenges to discriminatory state taxes. Furthermore, the First District's comparison is logically flawed. First, the court below wrongly compared the Reinishes, nonresidents who are not eligible for the Homestead Tax Exemption on the residential property they own in Florida, to "Florida residents who rent, rather than own, a particular Florida real-estate parcel."

Reinish, 765 So. 2d at 205 (App. at 12). Renters – and the landlords who rent to them – have no place in this case. The Reinishes are owners of residential property that they themselves occupy as a home, but they are denied the Homestead Tax Exemption on that owner-occupied home simply because of their nonresident status. Second, the court below wrongly compared the Reinishes to "Florida residents who use Florida real property as a secondary, seasonal, or vacation residence." *Id.* Here again, the comparison is deeply flawed, as can be seen by comparing a Florida permanent resident who owns two pieces of residential property in Florida to a nonresident who similarly owns two pieces of residential property in Florida. That Florida resident can be eligible for a homestead tax exemption on one of those Florida homes, while the nonresident cannot ever be eligible for any homestead exemption, no matter how many Florida homes he or she owns.

When the constitutionally proper comparison is made, it becomes clear that the Reinishes want the benefit of Florida's Homestead Tax Exemption for one piece of Florida residential property, not all residential property they might someday own. Thus, like their Florida resident neighbors, living in an identical house, the Reinishes need one – and only one – residential property exemption in the state of Florida.

Granting this Petition would give this Court the opportunity to clarify, for the benefit of Florida and other state courts which have made a similar constitutional error,[7] that the proper comparison in a constitutional

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[7] *See Stahl v. Village of Hoffman Estates*, 296 Ill. App. 3d 550, 694 N.E.2d 1102, *appeal denied*, 179 Ill. 2d 620, 705 N.E.2d 450 (1998); *Citizens for Unif. Taxation v. Northport Pub. Sch. Dist.*, 239 Mich. App. 284, 608 N.W.2d 480 (2000).

challenge to a discriminatory state tax is between the nonresident taxpayers who cannot get the benefit and the resident taxpayers who can. That comparison will demonstrate discrimination *vel non*.

B. The Florida Court's Opinion Conflicts With the Decisions of the Courts of Last Resort of Other States and the Decisions of This Court, Which Have Rigorously Applied the Privileges and Immunities Clause to Prohibit Discriminatory State Taxation of Nonresidents.

Like the other states whose discriminatory taxes have failed to pass muster under the rigorous Privileges and Immunities Clause test, Florida has failed to establish a substantial purpose for the Homestead Tax Exemption's discriminatory structure and cannot demonstrate how its discrimination against nonresidents bears a substantial relationship to that purpose. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (state must defend Privileges and Immunities challenge by demonstrating "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."). *See also Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998).

The Homestead Tax Exemption provides substantial benefits for residents only, while providing no comparable benefits for nonresidents like the Reinishes. The Homestead Tax Exemption (in conjunction with the accompanying "Save Our Homes" provision) substantially reduces the ownership costs of Florida residential real property. The State has demonstrated no justification, let alone the substantial justification required by this

Court's modern Privileges and Immunities Clause decisions, for this radical disparity in treatment.

It is undisputed that neither the original (1934) version of the Homestead Tax Exemption Act, nor any of the numerous statutes subsequently amending that Act, contain any language articulating a legislative purpose for the tax exemption. Ignoring this absence of legislative purpose, the First District erroneously accepted a purpose hypothesized by Respondents for this litigation – "to promote and protect taxpayers' financial ability to purchase and maintain the primary shelter." *Reinish*, 765 So. 2d at 210 (App. at 15). The First District added: "Public policy considerations favor laws protecting the basic homestead, which 'promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune.' " *Id.* at 206-07 (citations omitted).

Moreover, the Florida court offered no reason why this hypothesized purpose (even if it could be accepted) presents a substantial reason for the disparity in treatment between residents and nonresidents. Nonresidents like the Reinishes, who do not qualify for a homestead exemption in their home state and pay full real estate taxes on their Florida home, have the same interest in owning a home that is protected from "the reach of economic misfortune." *Id.* Even if some form of homestead tax exemption somewhere might theoretically promote the redistributional purpose hypothesized by the court below, the actual structure of Florida's Homestead Tax Exemption – a flat exemption from real estate taxes for the first $25,000 of a house's value, whatever the total

value might be – benefits *all* permanent Florida residents who own houses, irrespective of their incomes – both billionaires and middle-class persons. *See generally* Walter Farr, *The Property Tax as an Instrument for Economic and Social Change*, 9 Urb. Law. 447, 494 n.151 (1977) ("Homestead exemptions are relatively inefficient because they afford equal relief to all regardless of need.").

Furthermore, the fact that the Reinishes do not reside in their Florida home on a year-round basis cannot serve as a justification for the discrimination, because Florida does not require that the owner actually, physically occupy the house in order to qualify for the exemption. *See* Fla. Const. art. VII, § 6 ("the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon") (emphasis added); Fla. Stat. § 196.031 (containing virtually identical language).[8]

Therefore, the *post-hoc* purpose, wrongly accepted by the court below, cannot satisfy this Court's requirement of a "substantial justification" for the discrimination inherent in the Homestead Tax Exemption. *See Lunding*, 522 U.S. at 314.

The Florida court's analysis directly conflicts with a recent New York Court of Appeals decision, which correctly held that the Privileges and Immunities Clause

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[8] *See* Op. Att'y Gen. Fla. 82-27 (1982) (interpreting the emphasized language to allow the tax exemption to be claimed by a nonresident owner whose adult child college student occupies the property as a permanent resident); *id.* (absence of an owner from the state for work or sabbatical does not necessarily constitute abandonment of the qualification for the tax exemption). *See also Reinish*, 765 So. 2d at 205 (App. at 11); *Wells v. Vallier*, 773 So. 2d 1197 (Fla. Dist. Ct. App. 2000).

requires the "taxing State to demonstrate both that there is a substantial reason for the difference in treatment of [residents and nonresidents] and that the discrimination practiced against nonresidents bears a substantial relationship to the taxing State's objectives." *City of New York v. State*, 94 N.Y.2d 577, 593, 730 N.E.2d 920, 927 (2000) (citing *Piper*, 470 U.S. at 284). There, the New York Court invalidated a tax which subjected nonresidents of New York State who worked in New York City to the City's commuter income tax, while exempting from that tax residents of the State who commuted into the City to work. The *City of New York* court "conclude[d] that the reasons proffered by the State fail[ed] to satisfy the test of 'substantiality,' " because (like the Florida tax exemption challenged here) there was no support in the language or legislative history of the New York tax statute for the hypothesized purposes. 94 N.Y.2d at 594-95, 730 N.E.2d at 928-29.

Recently, *McLane v. Department of Revenue*, 2001 WL 238443 (Or. Tax Magis. Div. Feb. 13, 2001), summarized the principles derived from this Court's opinions in *Piper* and *Lunding* as follows:

> The upshot of these cases is that there must be substantial equality in treatment between residents and nonresidents and where a disparity exists there must be a substantial reason for the difference in treatment beyond the mere fact of nonresidency and the degree of discrimination must bear a close relationship to the concern the statute is intended to address.

Id. at *4. The *McLane* court concluded that Oregon had failed to establish a substantial justification for the disparity in a law that discriminated against nonresidents with respect to deferral of taxation of gain from the

transfer of real property. Like the Florida law challenged in the instant case, the statute challenged in *McLane* wrongly focused upon the "residency status of the investor" rather than the location of the newly acquired property. *Id.* at *6. The statute, therefore, was invalidated on Privileges and Immunities Clause grounds. *See also State ex rel. McCulloch v. Ashby*, 73 N.M. 267, 387 P.2d 588 (1963) (denying nonresidents the personal income tax exemptions that were available to residents violated the Privileges and Immunities Clause); *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (denying nonresidents a tax deduction for alimony payments, which was available to residents, violated the Clause).

Of course, it does not matter that *City of New York, McLane, McCulloch* and *Wood* involved challenges to taxes that are slightly different from the real estate tax exemption challenged in this case. "When the controversy involves a State tax scheme that contravenes rights secured by the Federal Constitution, the decision depends not on a question of form, construction or definition of the tax, but upon its practical operation and effect." *City of New York*, 94 N.Y.2d at 593, 730 N.E.2d at 927.

Indeed, state courts have long scrutinized real estate tax credits and refunds closely under the Privileges and Immunities Clause. In *Borden v. Selden*, 259 Iowa 808, 811, 146 N.W.2d 306, 309 (1966), the Iowa Supreme Court held that the Agricultural Land Tax Credit Act, "which by its terms, denie[d] to nonresident owners of land in Iowa a land tax credit granted resident owners of Iowa land" violated the Clause. Similarly, the South Dakota Supreme Court opined that there was "no reasonable basis for the discrimination contained in" a real estate tax relief

scheme that would have been available only to state residents, and, therefore, would have resulted in "a higher tax upon citizens of other states" than would be imposed upon South Dakota citizens. *Opinion of the Judges*, 81 S.D. 629, 632, 140 N.W.2d 34, 35-36 (1966). Therefore, the South Dakota Supreme Court unanimously advised that the real estate tax relief scheme (comparable to Florida's) would violate the Privileges and Immunities Clause. *Id.*

The court below was misguided when it disregarded these directly relevant state court cases and, instead, relied upon *Rubin v. Glaser*, 83 N.J. 299, 416 A.2d 382, *appeal dismissed*, 449 U.S. 977 (1980). In *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998), this Court specifically "reject[ed] the State's suggestion that this Court's summary dismissals in several other cases should be dispositive of the question presented in this case." 522 U.S. at 306 & n.3 (citing, *inter alia, Rubin*). The *Lunding* Court added that Supreme Court summary dismissals (as in *Rubin*) "do not 'have the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits.' " 522 U.S. at 307 (quoting *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 (1979)). Thus, *Rubin* can hardly be considered an applicable precedent now that *Lunding*, after full briefing and argument, has brushed it aside in the process of invalidating a state tax benefit which, like the tax exemption challenged in the instant case, was available only to state residents. *See also Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) (discussed in Part C, below). Similarly, the court below was wrong to rely upon *Baker v. Matheson*, 607 P.2d 233

(Utah 1979), which was decided fully 19 years before *Lunding* and 18 years before *Camps*.

The discrimination imposed by Florida's Homestead Tax Exemption raises an important federal question, because many states have a homestead tax exemption. Many of them, like Florida, exclude nonresidents from the exemption. Few states have a homestead tax exemption as high as Florida's. *See* 1 *Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism* 138-43 (Table 36) (1995) (state-by-state comparisons of homestead exemption levels, showing Florida to be among the highest). Furthermore, Florida is one of the few states that does not require that the owner actually occupy the residence in order to be entitled to the exemption.[9] Thus, although the extent of the discrimination against nonresidents by Florida's Homestead Tax Exemption is particularly egregious, many other states perpetrate comparable discrimination in homestead exemption provisions.

Granting this Petition would give this Court the opportunity to clarify, for the benefit of Florida and other states that continue this unconstitutional tax discrimination, that it is not the type of tax (or exemption) which is crucial; rather, the constitutional error arises from denying the exemption based upon the residency status of the taxpayer. This is constitutionally unacceptable under the Privileges and Immunities Clause.

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[9] *See* footnote 8, above, and accompanying text.

C. The Florida Court's Opinion Conflicts With the Decisions of the Courts of Last Resort of Other States and the Decisions of This Court Regarding Important Federal Questions Related to Discriminatory Taxation of Nonresidents in Violation of the Dormant Commerce Clause.

The ruling by the court below – that total exclusion of nonresidents from Florida's Homestead Tax Exemption does not violate the dormant Commerce Clause – conflicts with numerous dormant Commerce Clause decisions issued by the courts of last resort in other states and decisions recently issued by this Court. Review by this Court would resolve and correct this conflict.

In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), this Court articulated five propositions which fully resolve this case in the Reinishes' favor: (1) the dormant Commerce Clause applies to state taxation of non-commercial activities (including taxes upon non-profit companies and individuals), (2) the Clause applies to real estate taxes, (3) the Clause forbids discriminatory tax burdens upon out-of-state consumers of state resources (including owners of real estate), (4) discriminatory exemptions to generally applicable taxes are not constitutionally permissible, and (5) a *per se* test applies to facially discriminatory laws, which virtually always results in invalidation.

The First District, however, failed to apply the *Camps* factors as this Court had intended, incorrectly concluding that "the facts in *Camps Newfound/Owatonna* are clearly distinguishable from the circumstances presented in the Florida homestead tax exemption provisions." *Reinish*, 765 So. 2d at 214 (App. at 30). The First District based this erroneous conclusion upon its misdirected comparison of

the Reinishes, who as nonresidents are ineligible to receive the benefit of the Homestead Tax Exemption, to those Florida residents who are also ineligible, instead of making the required comparison – between the ineligible Reinishes and the many Florida residents who are eligible to receive the benefit of Florida's Homestead Tax Exemption. *See generally* Part A, above.

Contrary to the First District's analysis, the *Camps* propositions apply here, because the Reinishes and the class they seek to represent are engaged in direct economic competition with Florida residents for the purchase of residential real estate. The Homestead Tax Exemption (in conjunction with the "Save Our Homes" provision) affords permanent Florida residents a clear and continuing economic advantage over nonresidents in that economic competition. The residential property of permanent Florida residents is eligible for an exclusion from real estate *ad valorem* taxes of the first $25,000 of its assessed value. This is worth an average of $555.75 per year. *See* 1998 *Florida Tax Handbook* 126 (average millage rate of 22.23 multiplied by 25). Furthermore, the "Save Our Homes" provision of the Florida Constitution significantly leverages these benefits for Floridians, by limiting the annual reassessments of their "homestead property" to the lesser of 3% of the assessed value of the property or the increase in the Consumer Price Index. *See* Fla. Const. art. VII, § 4(C); Fla. Stat. § 193.155; note 4, above, and accompanying text. As a result, the gap between the lower real estate taxes paid by a Florida resident and the higher taxes paid by a nonresident on identical pieces of property will grow even wider over time.

Moreover, *Camps* reaffirmed that facially discriminatory laws are "virtually *per se* invalid." *See* 520 U.S. at 575,

581-85. Florida's Homestead Tax Exemption facially discriminates against interstate commerce by denying the exemption to (and thus imposing higher real property taxes upon) nonresidents. As noted above, the crucial fact, discernible from the face of the challenged statute itself, is that no nonresident can ever obtain a Florida homestead tax exemption. It is, by definition, available only to Florida residents. *See* note 5, above, and accompanying text.

As in *Camps*, Respondents in this case have "made no effort to defend the statute under the *per se* rule." 520 U.S. at 581. Thus, the First District's reliance on the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), is improper. *See Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 100 (1994) ("Because the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard here, not the *Pike* balancing test."). Yet even under the *Pike* balancing test, the Reinishes should prevail, given the tax burden upon nonresidents and the lack of a legitimate purpose for exempting only permanent Florida residents.

State courts of last resort have consistently applied *Camps* (and similar Supreme Court cases) to invalidate state laws under the dormant Commerce Clause. *City of New York v. State*, 94 N.Y.2d 577, 730 N.E.2d 920 (2000), recently invalidated the New York City commuter income tax because it applied only to nonresidents of New York State who commuted to work in New York City, while exempting residents of New York State who commuted to work in the City. In addition to the Privileges and Immunities Clause ruling described in Part B, above, the New York Court of Appeals ruled that the disparate treatment

of residents and nonresidents by the challenged tax violated the dormant Commerce Clause. *See* 94 N.Y.2d at 598, 730 N.E.2d at 931.

Similarly, in *General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561 (Mo. 1998), the Missouri Supreme Court held that denying a nonresident parent corporation the right to file a consolidated tax return discriminated against interstate commerce in violation of the dormant Commerce Clause. That court rightly concluded that denying this tax benefit to the nonresident parent corporation because of its "geographic location and corporate structure" constituted "an impermissible burden on interstate commerce." *Id.* at 566.

In arriving at that conclusion, the Missouri court summarized key propositions of this Court's well-established Commerce Clause jurisprudence. These key propositions are also directly applicable to the instant case:

> State laws that facially discriminate against interstate commerce are virtually *per se* unconstitutional. . . . The scope and magnitude of the discrimination has no bearing on determining whether the discrimination has occurred. . . . A court need not inquire into the purpose or motivation behind a law to determine that it actually discriminates against interstate commerce. . . . Nor does it matter whether the form of the tax discrimination is a tax penalty or a tax benefit.

Id. at 565 (citing *Camps*, 520 U.S. at 575, 578-79; *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996); *Associated Indus. v. Lohman*, 511 U.S. 641, 647, 650, 653 (1994); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

Similarly, the Pennsylvania Supreme Court held that disparate treatment of in-state and out-of-state corporations with respect to the personal property tax violates the dormant Commerce Clause. *See Annenberg v. Commonwealth*, 562 Pa. 570, 757 A.2d 333 (1998). The Pennsylvania court, relying upon this Court's established precedents, articulated two key propositions which are directly in conflict with the decision of the court below. First, "discrimination" against interstate commerce " 'simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' " *Id.* at 575, 757 A.2d at 335 (quoting *Oregon Waste*, 511 U.S. at 99). Second, "[o]nce we have determined that a statute is facially discriminatory, we need not also determine the actual impact of the discriminatory tax because . . . the magnitude of the negative impact on interstate commerce is irrelevant in determining whether a state provision violates the Commerce Clause." *Id.* at 578, 757 A.2d at 337 (relying, *inter alia*, upon *Associated Indus.*, 511 U.S. 641).

The holdings of these two cases, and of this Court's cases which they cite, are applicable to all types of taxes, including real estate taxes, and to all types of tax benefits. Indeed, "the form by which a state erects barriers to commerce has no effect on the determination whether discrimination exists." *General Motors Corp.*, 981 S.W.2d at 567 (citing *West Lynn Creamery*, 512 U.S. at 201). Yet, the court below simply disregarded these well-established precedents and treated a homestead tax exemption as if it were, for some reason, exempt from these Supreme Court and state court precedents.

Although the Florida district court is not alone in its error,[10] it is clear that this Court and state courts of last resort have interpreted the "dormant" aspect of the Commerce Clause to limit severely the extent to which states can discriminate against, burden, or tax interstate commerce. *See Oregon Waste*, 511 U.S. at 93, 98-100; *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *City of New York*, 94 N.Y.2d at 597, 730 N.E.2d at 930 (tax relief for residents does not justify discrimination against nonresidents).

D. The Florida Court's Opinion Conflicts With the Decisions of This Court Regarding Equal Protection Challenges to State Taxes That Discriminate Against Nonresidents.

In rejecting the Reinishes' Equal Protection claim, the court below incorrectly concluded that there was no violation because Florida homeowners who purchase a second piece of Florida residential property are ineligible for the Homestead Tax Exemption for that second property. *See Reinish*, 765 So. 2d at 203-07 (App. at 8-16). As noted in Part A, above, under this Court's established jurisprudence the proper comparison is between the Reinishes, who can never obtain a homestead exemption, and their Florida-resident neighbors, who can obtain a homestead exemption for an identical piece of real property in Ocean Ridge, Florida, simply because they are Florida residents. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *Williams v. Vermont*, 472 U.S. 14, 23 (1985).

Though this Court's analysis of Equal Protection Clause challenges to business regulations is generally deferential to the states, the Court has reacted strongly –

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[10] *See* note 7, above.

and negatively – to taxes that discriminate against nonresidents. This is illustrated by *Ward*, which invalidated a statute that imposed a lower tax on Alabama insurance companies than on out-of-state companies doing business in Alabama, because it reflected "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." 470 U.S. at 878. The *Ward* Court added: "The validity of the view that a State may not constitutionally favor its own residents by taxing foreign [out-of-state] corporations at a higher rate solely because of their residence is confirmed by a long line of this Court's cases so holding." *Id. See also Williams*, 472 U.S. at 23 ("A State may not treat those within its borders unequally solely on the basis of their different residences.").

Ward and *Williams* (and similar Equal Protection Clause cases) have rejected discriminatory taxes for reasons closely parallel to those relied upon by this Court in rejecting discriminatory taxes under the stricter tests of the Privileges and Immunities Clause and the dormant Commerce Clause. *See* Parts B and C, above.

Instead of considering these key relevant cases – that dealt directly with taxes which discriminate against nonresidents – the court below relied upon cases that dealt only with differential treatment of two groups of residents. For example, *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), is a dated case which upheld an unemployment compensation system despite its differential treatment of certain subgroups of in-state employers and employees. It therefore has no relevance to the disparate treatment of residents compared to nonresidents in the instant case. *See* Part A, above. *Nordlinger v. Hahn*, 505

U.S. 1 (1992), though newer, also focused upon differences between two groups of in-state property owners.[11]

Finally, the First District was mistaken in accepting Respondents' invitation to rely upon *Rubin v. Glaser*, 83 N.J. 299, 416 A.2d 382, *appeal dismissed*, 449 U.S. 977 (1980). As noted in Part B, above, *Rubin* can hardly be considered an applicable precedent today, since this Court, in *Lunding*, brushed *Rubin* aside in the process of invalidating a state tax benefit which, like the tax exemption challenged in the instant case, was available only to state residents. *See Lunding*, 522 U.S. at 306 & n.3.

Therefore, there is a clear conflict between the First District's opinion and the relevant Equal Protection decisions of this Court – those dealing with state taxes that discriminate against nonresidents.

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[11] Furthermore, that portion of the holding in *Nordlinger* relied upon by the court below might be open to reconsideration after the decision in *Saenz v. Roe*, 526 U.S. 489 (1999).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the District Court of Appeal,
First District, State of Florida

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

Stanley REINISH and Carol REINISH,

Appellants,

v.

John K. CLARK, in his official capacity as Tax Collector of Palm Beach County and as representative of other county tax collectors in the State of Florida; Gary Nikolits, in his official capacity as Property Appraiser of Palm Beach County; and L.H. Fuchs, in his official capacity as Executive Director of Florida Department of Revenue,

Appellees.

_____/

CASE NO. 1D98-3973.

Opinion Filed July 20, 2000.

An appeal from the Circuit Court for Leon County. P. Kevin Davey, Judge.

C. Oliver Burt, III of Burt & Pucillo, L.L.P., West Palm Beach; James K. Green of James K. Green, P.A., West Palm Beach; M. David Gelfand, New Orleans, Louisiana; Michael J. Freed, of Much, Shelist, Freed, Deneberg, Ament, Bell & Rubenstein, P.C., Chicago, Illinois; and Harry O. Thomas, of Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A., Tallahassee, for Appellants.

Robert A. Butterworth, Attorney General; Joseph C. Mellichamp, III, Senior Assistant Attorney General; and Jarrell L. Murchison, Assistant Attorney General, Tallahassee, for Appellees.

BROWNING, J.

Stanley and Carol Reinish, who were the plaintiffs in the lower court, appeal a final order dismissing their second amended complaint with prejudice. In his official capacity as Executive Director of the Florida Department of Revenue, L.H. Fuchs, one of the defendants below, cross-appeals those portions of the final order finding that the circuit court had subject-matter jurisdiction and that the Reinishes had standing to bring a facial challenge testing the validity of the Florida homestead tax exemption. Concluding that the trial court had jurisdiction pursuant to Chapter 86, Florida Statutes, and that the Reinishes had standing to bring a facial constitutional challenge, we affirm the lower court's rulings as to those issues raised on cross-appeal. Likewise, we conclude that the trial court correctly found the Reinishes' three theories of unconstitutionality to be without legal merit. Accordingly, we affirm the order dismissing the second amended complaint with prejudice.

JURISDICTION AND STANDING

In their second amended complaint, the Reinishes asserted circuit-court jurisdiction pursuant to Article V, section 20(c)(3), of the Florida Constitution, and section 26.012, Florida Statutes (1997), both of which address "cases involving legality of any tax assessment or toll"; and pursuant to sections 86.011, 86.021, and 86.061, Florida Statutes (1997), the Declaratory Judgments Act. Their action sought a declaration that the constitutional[1] and statutory[2] Florida homestead tax exemption provisions violate the federal Equal Protection Clause, the Privileges and Immunities Clause, and the "dormant" Commerce Clause to the extent that the homestead tax exemption is available only to certain permanent residents of Florida. In addition to a declaration of the rights of the parties and injunctive relief, the Reinishes sought an accounting by the defendants and a refund of such portions of the residential real estate taxes paid by the Reinishes and their class that they would not have been required to pay if the homestead tax exemption had been available to them.[3]

At the onset of this litigation and at all times pertinent to this action, the Reinishes have remained residents of Chicago, Illinois. Around September 1994, they bought a parcel of real estate in Palm Beach County, Florida, for use as a part-time residence. Since then, they have paid

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[1] Art. VII, § 6, Fla. Const.

[2] Section 196.031, Fla. Stat. (1997).

[3] Venue in this case was transferred from Palm Beach County to Leon County.

real estate taxes as assessed on the Florida property but have been ineligible to receive an exemption of the first $25,000 of assessed value because their use of the Florida property does not qualify it as a "permanent residence." § 196.031(3)(d), Fla. Stat. The Reinishes admit that they stay in the Florida property only about 4-5 months each year and reside in Illinois for the greater part of the year.

In the trial court, Executive Director Fuchs and the other defendants argued 1) that the Reinishes could not circumvent the jurisdictional requirements of section 194.171, Florida Statutes (1997), by seeking relief in the form of a refund under Chapter 86; and 2) that the Reinishes failed to allege that they had contested their assessment within 60 days from the date the assessment was certified for collection in any of the tax years in question. § 194.171(2), Fla. Stat. On that basis, the defendants moved to dismiss for lack of subject-matter jurisdiction. § 194.171(6), Fla. Stat. Furthermore, the defendants argued that the Reinishes lacked standing because they neither alleged compliance with the procedures governing the annual application for homestead tax exemption under section 196.011(1), Florida Statutes (1997), for creating a case or controversy; nor did they claim to have been denied the homestead tax exemption after filing a timely, written application for one.

The trial court found that it had subject-matter jurisdiction under Chapter 86. In support of this finding, the Reinishes properly rely on well-established case law holding that in actions such as this, where the facial constitutionality of a tax or tax exemption provision is challenged, "fulfilling the state's refund procedures is not a condition precedent to bringing a constitutionally-

based refund action." *Public Medical Assistance Trust Fund v. Hameroff*, 689 So. 2d 358, 359 (Fla. 1st DCA 1997), *approved in pertinent part*, 736 So. 2d 1150 (Fla. 1999); *Department of Revenue v. Nemeth*, 733 So. 2d 970, 973-74 (Fla. 1999). The Reinishes are neither challenging their assessment nor seeking an exemption for which they claim present entitlement. Rather, they are challenging the constitutional and statutory requirement of establishing a Florida "permanent residence" to be eligible for the homestead tax exemption. Situations such as this constitute an exception to the general rule that requires a party first to seek, and then be denied, a refund before suing for a tax refund. *See Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) (rejecting State's argument that class action was barred jurisdictionally in circuit court because none of class representatives had applied for refund pursuant to statutory provisions); *Hameroff*, 689 So. 2d at 359; *Devlin v. Dickinson*, 305 So. 2d 848 (Fla. 1st DCA 1975). Given the reasoning set forth in the supreme court's *Kuhnlein* opinion, the trial court properly found jurisdiction over the instant action.

Kuhnlein, 646 So. 2d at 717, as well as several earlier supreme court decisions, also supports the trial court's finding that the Reinishes have standing to challenge the Florida homestead tax exemption provisions. Florida does not adhere to the "rigid" doctrine of standing used in the federal system. *See id.* at 720. Rather, the general requirement for standing in Florida posits that "every case must involve a real controversy as to the issue or issues presented," so that "the parties must not be

requesting an advisory opinion." *Id.* at 720-21. In a seminal 1952 decision, the supreme court set out the Florida rule:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answers propounded from curiosity. These elements are necessary as being judicial in nature and therefore within the constitutional powers of the courts.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952); *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991). The Declaratory Judgments Act is "substantive and remedial," with a purpose "to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations," and the Act is "to be liberally administered and construed." § 86.101, Fla. Stat. (1997). Individuals can challenge the validity of a statute in a declaratory action. § 86.021, Fla. Stat. (1997).

We conclude that the Reinishes clearly have satisfied the standing requirements of *May* and its progeny. *See Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 263 n.5 (Fla. 1991) ("This Court has long held that a citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury."). In determining that nothing in Florida law required the plaintiffs in *Kuhnlein* to pay the impact fee or to request a refund to gain standing, the supreme court found it sufficient "that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax." 646 So. 2d at 720. Similarly, the Reinishes alleged that they have had to pay more than their lawful share of taxes because of a tax exemption that unconstitutionally discriminates against them based on their out-of-state residency. Their being assessed full property taxes annually, without the benefit of the homestead tax exemption, created a bona fide, actual, present, and practical need for the declaration sought.

STANDARD OF REVIEW

The challenged final order dismissing the second amended complaint for failure to state a claim is premised entirely upon the trial court's conclusion that the Florida homestead tax exemption does not, on its face, violate the United States Constitution on any of the grounds asserted by the plaintiffs. Therefore, the lower tribunal's rulings are strictly questions of law to which a *de novo* standard of review applies. *See Brewer v. Clerk of Circuit Court, Gadsden County*, 720 So. 2d 602, 603 (Fla. 1st DCA 1998).

COUNT ONE

The first count alleged that in denying the homestead tax exemption to the Reinishes and their class solely on the basis of their out-of-state residency, the constitutional and statutory homestead provisions have created a classification and/or distinction that is wholly arbitrary and discriminatory, thereby denying equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.[4] "A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation." *Williams v. Vermont*, 472 U.S. 14, 23 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *WHYY v. Glassboro*, 393 U.S. 117 (1968). For reasons that are set forth, *infra*, we find no such defects in the Florida homestead tax exemption scheme.

It is an undeniable fact of life that many, if not most, laws distinguish or classify among classes of persons. *See Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 254-55 (1922); *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1980). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (Equal Protection Clause not violated by California property tax system in which assessed value could increase only two per cent a year except in cases of improvements or change of ownership). As a general rule, "legislatures

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[4] The Clause mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Art. XIV, § 1, U.S. Const.

are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). Consonant with this is another rule that states generally have considerable leeway to legislate classifications and to define lines and limits that, in their considered judgment, result in reasonable taxation systems. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Heisler*, 260 U.S. at 255; *Watson v. State Comptroller of New York*, 254 U.S. 122, 124-25 (1920). As the United States Supreme Court has indicated on numerous occasions:

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation.

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937) ("This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation."); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 284 (1932); *Bell's Gap*, 134 U.S. at 237; *Rojas v. Fitch*, 928 F.Supp. 155 (D.R.I. 1996). The Court in *Carmichael* added:

> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

301 U.S. at 509. In light of these rules, the High Court "has been reluctant to interfere with legislative policy decisions in this area." *Williams*, 472 U.S. at 22; *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983).

As the Florida homestead tax exemption scheme imposes no meaningful restriction upon the Reinishes' fundamental right to travel or upon any other fundamental right, the burden does not fall upon the State to show its compelling interest justifying the law. The Court's equal protection jurisprudence clearly indicates:

> [U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

Nordlinger, 505 U.S. at 10; *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-41 (1985); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *New Orleans v. Dukes*, 427 U.S. 297 (1976). Stated another way, a tax exemption such as the one challenged here "will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983); *Williams*, 472 U.S. at 22-23. The relaxed "rational basis" standard is consonant with the understanding that making distinctions is an inherent, unavoidable legislative function, *see Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 489 (1977), and this standard is particularly deferential concerning classifications made in

complicated tax matters, *see Nordlinger*, 505 U.S. at 11, for "in structuring internal tax schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " *Williams*, 472 U.S. at 22, *quoting Lehnhausen*, 410 U.S. at 359.

By its express terms, the constitutional provision governing the Florida homestead tax exemption applies to real estate that is maintained as the "permanent residence" of the legal or equitable titleholder or of "another legally or naturally dependent upon the owner." No more than one exemption shall be allowed to any individual or with respect to any residential unit. Art. VII, § 6, Fla. Const. (1968). The parallel statute likewise addresses only real property on which the person with legal title or beneficial title in equity, or on which another or others who are "legally or naturally dependent upon such person," resides and in good faith makes a "permanent residence."[5] § 196.031(1), Fla. Stat. (1997); Op. Att'y Gen. Fla. 82-27 (1982). The underlying classification in the exemption provisions is based primarily on the *use* of the property rather than on the *user*. Whether the person is a

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[5] " 'Permanent resident' means a person who has established a permanent residence as defined in subsection (18)." § 196.012(17), Fla. Stat. (1997). " 'Permanent residence' means that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred." § 196.012(18), Fla. Stat.

Florida resident or not, only one homestead exemption is allowed, irrespective of how many other residences the person owns. Thus, the exemption distinguishes between real estate used in good faith as a Florida permanent residence, on the one hand, and (by implicit exclusion) any other real estate such as secondary or vacation residences or rentals, on the other hand. In other words, the Florida exemption treats the Reinishes no differently from either Florida residents who rent, rather than own, a particular Florida real-estate parcel, or Florida residents who use Florida real property as a secondary, seasonal, or vacation residence. A property owner does not have to be a citizen of the United States to be eligible for the homestead tax exemption, and there is no durational residency requirement. *See Smith v. Voight*, 28 So. 2d 426 (Fla. 1946).

The New Jersey Supreme Court's lucid analysis of an equal protection challenge to the New Jersey Homestead Rebate Act in *Rubin v. Glaser*, 416 A.2d 382 (N.J.), *app. dism.*, 449 U.S. 977 (1980), supports our conclusion that the Florida homestead tax exemption provisions do not offend equal protection guarantees. The Act in *Rubin* limited the homestead rebate to dwelling houses (and the land on which they were situated) owned and used by domiciliaries as their "principal residence." *Id.* at 383. The plaintiffs were residents of Pennsylvania who maintained their domicile there. They acquired a New Jersey vacation home, which they occupied for 4-5 weeks during the summer and intermittently at other times of the year. They admitted that they did not satisfy the statutory criteria for a tax rebate. After they were denied a rebate of real property taxes on their New Jersey summer house, they filed a claim with the local tax assessor, which was

rejected. *Id.* Addressing their claim that the Act denied the plaintiffs equal protection, the New Jersey Supreme Court made the following threshold determination:

> Denial of a homestead rebate on a vacation home does not rise to the level of a deprivation of "a basic necessity of life" or of a "fundamental" right. Furthermore, the homestead rebate is not denied to those persons, and only those persons, who have exercised their constitutional right of interstate migration. . . . Moreover, the Act contains no residential durational element of the type which has been held invalid where the individual has been required to have resided within the state for a minimum period of time.

Id. at 387. Given this finding, the court assessed the Act under the lenient "rational relationship" test and acknowledged the "broad deference accorded legislation with respect to taxation programs." *Id.* The court determined that the Act represented the New Jersey legislature's "attempt to blunt escalating property taxes that threaten a family's ability to continue living in their home," and it concluded that reducing the tax burden for that basic purpose while denying relief to "less essential types of residential property ownership" fell within the ambit of legislative discretion. *See id.* at 388. A similar rationale supports the Florida homestead tax exemption provisions' distinction between permanent residences and other less essential types of residential property ownership.

"States are not required to convince the courts of the correctness of their legislative judgments." *State of Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (Minnesota statute banning retail sale of milk in plastic,

non-returnable, non-refillable containers, but permitting such sale in other non-returnable, non-refillable containers such as paperboard milk cartons, did not violate Equal Protection Clause, where legislative classification was rationally related to achievement of statutory purposes such as fostering greater use of environmentally desirable alternatives). Instead, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

In attacking the validity of the homestead tax exemption, the Reinishes contend that the Florida constitutional and statutory provisions are deficient for failure to set out clearly the State purpose(s) underlying the exemption. Furthermore, they suggest that the purpose set forth by the appellee is merely an unsupported, *ad hoc* argument invented as a part of the litigation strategy. In determining the basis for a classification, courts sometimes must look beyond the language of the provision in question, especially where the creators of the provision have not included a clear statement of purpose for enacting or revising it. In this regard, the United States Supreme Court has stated that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U.S. at 15. Given the lack of a formal statement of purpose in the challenged provisions, we must look instead to the origins and subsequent history of the Florida homestead tax exemption to determine

whether the difference in treatment between Florida permanent residences and other real estate has a "legitimate state purpose."

"The home has a history of special significance in Florida law." *Osterndorf v. Turner*, 426 So. 2d 539, 541 (Fla. 1982) (chronicling history of Florida provisions protecting homestead realty from forced sale and establishing homestead tax exemption); Donna Litman Seiden, "There's No Place Like Home(stead) in Florida – Should It Stay That Way?" 18 *Nova L. Rev.* 801 (1994). The current language in the Florida Constitution provides for a homestead exemption of $25,000 (of the assessed value of the homestead) from taxes levied by governing bodies. Art. VII, § 6, Fla. Const. (1968). Public policy considerations favor laws protecting the basic homestead, which "promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune." *Bigelow v. Dunphe*, 197 So. 328, 330 (Fla. 1940); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988); *Collins v. Collins*, 7 So. 2d 443, 444 (Fla. 1942); *Law v. Law*, 738 So. 2d 522 (Fla. 4th DCA 1999); *Myers v. Lehrer*, 671 So. 2d 864 (Fla. 4th DCA 1996) (recognizing purpose of homestead provision is protection of the family); George L. Haskins, "Homestead Exemptions" 63 *Harv. L. Rev.* 1289, 1289 (1950) ("The principle objective of the homestead laws is generally regarded as the security of the family, which in turn benefits the community to the extent that such security prevents pauperism and provides the members of the family with some measure of security and independence."). Mindful of the historic,

civic, and economic significance of the need to foster and protect the primary residence of Florida homeowners, without an attendant need to give the same high level of protection to other types of residential properties, we conclude, as did the trial court, that the Florida homestead tax exemption's classification has some reasonable basis and does not offend equal protection concerns. The law-makers reasonably could have concluded that the challenged classification would promote a legitimate State purpose. Accordingly, the count based on the Equal Protection Clause was properly dismissed with prejudice.

COUNT TWO

The second count of the second amended complaint alleged that the Florida constitutional and statutory homestead tax exemption provisions unconstitutionally infringe upon the fundamental rights to travel interstate and to own property, in violation of the Privileges and Immunities Clause of Article IV, Section 2, United States Constitution.[6] The Reinishes contend that the Florida provisions discriminate impermissibly between full-time residents and part-time residents of the State and bear no rational connection to any valid concerns of the defendants.

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[6] This Clause states, in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Art. IV, § 2, Clause 1, U.S. Const. This provision is separate and distinct from the "privileges or immunities" provision in Article XIV, section 1, United States Constitution.

The Privileges and Immunities Clause sets out "a norm of comity" or "substantial equality of treatment" without indicating specifically the subjects over which non-residents coming within the jurisdiction of another state are to be accorded equal treatment. *See Austin v. New Hampshire*, 420 U.S. 656, 660 & 665 (1975). The Founding Fathers deemed it critical to unite the citizens of the various states into one union, and "it was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1869).

In an early leading case, Circuit Justice Washington construed the Clause as entitling the citizens of the several states only to

> those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). Justice Washington included among these "fundamental" privileges and immunities "the right of a citizen of one state . . . to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state." *Id.* at 552; *Ward v. Maryland*, 79 U.S. 418, 430 (1870); *Paul*, 75 U.S. at 180 (interpreting Privileges and Immunities Clause as ensuring the citizens of one state the same

freedom possessed by the citizens of another state "in the acquisition and enjoyment of property and in the pursuit of happiness"). For purposes of analysis of most cases under this Clause, the terms "resident" and "citizen" are "essentially interchangeable." *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor and Counsel of City of Camden*, 465 U.S. 208, 216 (1984). The United States Supreme Court has made it clear that especially in taxation matters, "legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Accordingly, the Court generally has exercised a narrow review of tax classifications "to fit the broad discretion vested in the state legislatures." *Austin*, 420 U.S. at 662. Even so, where a tax provision is alleged to be "an undue burden on an activity granted special constitutional recognition," the Court has indicated that "the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion." *Austin*, 420 U.S. at 662; *Lehnhausen*, 410 U.S. at 359.

In determining whether the Florida homestead tax exemption scheme infringes upon rights guaranteed by the United States Constitution, we must regard substance over mere form. This requires us to consider "the operation and effect of the law as applied and enforced by the State." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998), *quoting Shaffer v. Carter*, 252 U.S. 37, 55 (1920); *St. Louis Southwestern R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914). The first step in the analysis under the Clause is to determine whether the homestead tax exemption distinguishes between Florida residents and nonresidents. *See Lunding*, 522 U.S. at 297-98. The Reinishes assert that they are not treated substantially equally with

Florida residents under the homestead tax exemption scheme because they are non-residents. In response, the appellee contends that the exemption does not discriminate against non-residents at all, *i.e.*, no one (whether Florida resident or non-resident) receives an exemption for a home that is not used as a permanent residence. Although the Reinishes are non-residents, their Florida real property is treated the same as any vacation or seasonal homes of Florida residents, who are taxed upon the full value of those properties.[7] This result is consistent with the State's legitimate interest in assisting taxpayers/owners with the costs of their primary shelter and thereby fostering the stability of the basic homestead. Irrespective of the state of residency of their owners, secondary residences do not trigger the same public policy concerns and are not entitled to the same protection as permanent Florida residences. As a practical matter, those persons who are eligible to receive the homestead tax exemption typically will be Florida residents, for they are the taxpayers who have permanent residences in this state. However, this result does not necessarily run afoul of the Clause, for the Clause "is not an absolute." *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). The High Court has acknowledged that the United States Constitution does not preclude the States from adopting "justified and reasonable distinctions between residents and nonresidents in the provision of tax benefits, whether in the form of tax

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[7] We note that the mere fact that the Florida homestead tax exemption disadvantages some Florida residents too does not necessarily immunize the provisions from constitutional review in a challenge by similarly disadvantaged non-residents. *See United Building*, 465 U.S. at 217-18.

deductions or tax credits." *Lunding*, 522 U.S. at 310. "[I]nequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a [tax] system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell v. Bugbee*, 250 U.S. 525, 543 (1919). As with welfare benefits or free public education, a State is free to grant public assistance to bona-fide residents without providing it to others who do not have permanent ties to the State. *See Attorney General of New York v. Soto Lopez*, 476 U.S. 898, 903 n.3 (1986); *Martinez v. Byrum*, 461 U.S. 321 (1983).

If we assume *arguendo* that the homestead tax exemption scheme's classification of Florida permanent residences separately from other Florida properties discriminates against non-Florida residents, the second step in the analysis under the Clause would require us to determine whether the exemption provisions are prohibited "because they hinder the formation, the purpose, or the development of a single Union" of the States. *See Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 384 (1978). "Only with respect to those 'privileges and immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* at 383. The right "to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state" is protected by the Clause. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280-81 & n. 10 (1985); *Baldwin*, 436 U.S. at 384; *Corfield*, 6 F. Cas. at 551-52.

However, at the heart of the Reinishes' challenge is their contention that the Florida exemption imposes

greater financial burdens on non-residents than on residents who own Florida real property. Although the item that might or might not qualify for the homestead tax exemption, depending on its use, is real property, the crux of the Reinishes' complaint is that their current ineligibility for the exemption results from a denial of certain guarantees and protections in the Clause. Viewed from this perspective, their constitutional challenge really is based more on the denial of equal taxation than on an alleged infringement upon their right to acquire, hold, or dispose of property, for the homestead tax exemption scheme does not preclude non-residents from purchasing, enjoying, or disposing of Florida residential property.

To qualify for relief on this claim pursuant to the proper analysis set forth in the *Corfield* and *Austin* line of decisions, the Reinishes must show that non-residents' interest in an exemption from higher taxes on their secondary residence is, in the words of Circuit Justice Washington, one of those "privileges and immunities which are, in their nature, fundamental." *See Corfield*, 6 F. Cas. at 551.

In the context of the denial of a homestead tax exemption for a secondary or vacation residence, we find no such "fundamental" or essential right in the United States Constitution. *See Baldwin*, 436 U.S. at 388-90 (because nonresidents' access on equal terms with Montana residents' access to recreational big-game hunting is not a "fundamental" right protected under Clause, elk-hunting licensing scheme that imposed substantially higher license fees upon nonresidents was not a violation of Clause); *Rubin*, 416 A.2d at 387 (New Jersey Act that limited tax rebate to dwelling houses and land owned

and used by domiciliaries as their principal residences did not violate Privileges and Immunities Clause, for Act's applicability solely to principal residences was closely related to beneficent purpose of alleviating heavy, escalating realty tax burden and was not directed against non-residents); *Baker v. Matheson*, 607 P.2d 233, 247 (Utah 1979) (one-year residency requirement in Utah statute authorizing owner or renter of "primary residence" to file claim for refunds of State general fund free revenue did not render statute impermissibly discriminatory against non-residents so as to violate Privileges and Immunities Clause); Glen A. Stankee, "Residents' Property Tax Exemptions: A Modern Analysis Under the Privileges and Immunities Clause," 59 *Notre Dame L. Rev.* 878 (1984).

The difference in taxation treatment between the real property of non-residents and the property of *some* Florida residents (those who meet the "permanent residence" requirement) is only incidentally related to state residency, and it is explained by the practical effect of a provision that was intended to provide financial assistance to owners who make the Florida property their permanent residence. The Florida homestead tax exemption was not designed to protect all types of real property, and it does not preclude non-residents from purchasing, enjoying, or disposing of Florida property. Furthermore, the exemption does not infringe upon the Clause's guarantee "that individuals may migrate between States to live and work." *Lunding*, 522 U.S. at 313; *Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 1524-27 (1999) (constitutional right to travel is implicated by Privileges and Immunities Clause and protects right of citizen of one state to enter and leave another state, right to be treated as "a welcome

visitor rather than an unfriendly alien" when temporarily visiting another state, and right of new permanent residents to be treated like other citizens of state).

The exemption is reasonable in effect. It is closely and substantially related to the State's valid objective to promote and protect taxpayers' financial ability to purchase and maintain the primary shelter. This purpose constitutes a substantial justification totally unrelated to state residency. A secondary or vacation home does not implicate the same acute public policy concerns relating to the establishment and protection of a stable, financially secure primary residence. *See Rubin*, 416 A.2d at 387; *Baker*, 607 P.2d at 244 (noting that increased property taxes on vacation homes do not pose as great a threat to householder's standard of living as taxes or rent paid on a primary residence). The Florida exemption provides no greater, or lesser, benefit to Florida owners of secondary homes than it does to the Reinishes and any other non-residents. *See Blake v. McClung*, 172 U.S. 239, 252 (1898); *The Slaughter-House Cases*, 16 Wall. 36, 77, (1872); *Paul*, 75 U.S. at 168 & 180. As those non-residents who wish to buy, keep, or dispose of Florida secondary residences are treated on terms of substantial equality with Florida residents under the challenged Florida provisions, we find no violation of a privilege or interest that is sufficiently "fundamental" to the advancement of interstate harmony, and therefore protected, under the Clause. *See United Building*, 465 U.S. at 218-20; *Baldwin*, 436 U.S. at 383-84 & n. 20; *Toomer*, 334 U.S. at 396.

As the Reinishes have not demonstrated the denial of a right protected by the Privileges and Immunities Clause, this count was properly dismissed with prejudice.

COUNT THREE

The third and final count of the second amended complaint alleged that the constitutional and statutory homestead tax exemption provisions constitute a *per se* violation of the "dormant" Commerce Clause in Article I, Section 8, United States Constitution,[8] in that they attempt to create customs duties, barriers, or taxes that discriminate against and unduly burden interstate commerce and impermissibly impose a tariff on citizens whose primary residence is located outside Florida. As "[t]he states are not separable economic units," *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949), underlying the Clause is "the principle that one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

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[8] The Commerce Clause states, in pertinent part: "The Congress shall have power to . . . regulate Commerce with foreign Nations, and among the several States." Art. I, § 8, cl. 3, U.S. Const. In one respect, the Clause constitutes an affirmative grant of power to Congress. The Clause also has a negative or dormant aspect, which severely limits the extent to which the States or local governments can discriminate against, unduly burden, tax, or otherwise interfere with interstate commerce or engage in economic isolationism, even in the absence of an exercise of Congress' affirmative power. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (negative aspect of Commerce Clause bans economic protectionism, *i.e.*, "measures designed to benefit in-state economic interests by burdening out-of-state competitors"); *Oregon Waste Sys., Inc. v. Dep't of Env. Quality*, 511 U.S. 93, 98 (1994); *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The "dormant" Commerce Clause case law of the United States Supreme Court essentially has allowed a presumption that state legislation is intended to regulate local activities under the police power. However, exceptions are recognized in two main instances. *See generally* Thomas W. Merrill, "Toward a Principled Interpretation of the Commerce Clause," 22 *Harv. J.L. & Pub. Pol'y* 31, 40-41 & nn. 34-37 (1998).

The first step in assessing whether a state or local regulation violates the Clause involves the determination of whether the regulation treats out-of-state commerce differently. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996); *Toomer*, 334 U.S. at 394; *Welton v. Missouri*, 91 U.S. 275, 280 (1876) (noting one of fundamental purposes of Clause was "to insure . . . against discriminating State legislation"). "Discrimination" refers to differential treatment, *see Oregon Waste Syst.*, 511 U.S. at 99, such as where a regulation places a greater economic burden on those outside the state, with an attendant economic advantage to those within the state. *See South Carolina Highway Department v. Barnwell Brothers*, 303 U.S. 177, 184-86 & n.2 (1938). If, for example, a state tax is found to discriminate against interstate commerce, usually it will be stricken as a violation of the Clause, without additional inquiry. *See Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992). This is because if the legislation discriminates against interstate commerce, it very likely is undergirded by an impermissible motive. Where a state or local law is discriminatory, then the presumption that the intent of the law is permissible is reversed, and the State or the local entity must demonstrate that it has a strong, legitimate local concern that warrants the discrimination. *See*

Maine v. Taylor, 477 U.S. 131, 138 (1982); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

Even where a regulation is not *per se* discriminatory, the court must decide whether the regulation substantially burdens interstate commerce while the local benefits appear insubstantial. *See Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982); *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 447 (1978). If the burden on interstate commerce clearly outweighs the regulation's potential benefits, then the regulation will be found deficient. *See C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994).

The dormant aspect of the Clause provides protection for persons, not just for goods, that move across state borders; it is immaterial whether the transportation is of a commercial or profit-making nature. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 573 (1997); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 n.8 (1984) ("[D]iscrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers."); *Edwards v. California*, 314 U.S. 160, 172 & n.1 (1941) (invalidating, as unconstitutional barrier to interstate commerce, California statute that prohibited knowingly "bringing into the State any indigent person who is not a resident of the State"). The dormant aspect of the Clause covers and protects "markets and participants in markets," *Tracy*, 519 U.S. at 300, including those engaged in competition for real natural resources such as real estate. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (Clause "precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources

located within its borders or to the products derived therefrom."); *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980); *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). "A tax on real estate, like any other tax, may impermissibly burden interstate commerce," and the fact "[t]hat the tax discrimination comes in the form of a deprivation of a generally available tax benefit, rather than a specific penalty on the activity itself, is of no moment." *Camps Newfound/Owatonna*, 520 U.S. at 574 & 578-79; *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988) (invalidating Ohio statute that provided tax credit for sales of ethanol produced in-state, but not ethanol produced in certain other states). "[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia*, 437 U.S. at 624; *Chemical Waste Management*, 504 U.S. at 342. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect." *Bacchus Imports*, 468 U.S. at 270-71 (Hawaii liquor tax exemption for pineapple wine and for brandy distilled from root of indigenous shrub violated Clause in that it had discriminatory purpose of aiding Hawaii liquor industry and clearly discriminatory effect of applying only to locally produced alcoholic beverages); *Clover Leaf Creamery*, 449 U.S. at 471 & n.15; *Hunt*, 432 U.S. at 352-53 (North Carolina statute that effectively prohibited display of Washington State apple grades on closed containers shipped into North Carolina burdened interstate sales of Washington State apples, which were subject to expensive inspection and grading system in Washington, and had discriminatory effect upon them,

shielding North Carolina apple growers/dealers and leaving them unaffected, in violation of Commerce Clause).

If the homestead tax exemption fails the first step of the two-part test, then it violates the Clause and our inquiry ends. However, even if the challenged provisions are not *per se* discriminatory, the second step of the analysis requires us to determine whether the exemption scheme places a burden on interstate commerce that clearly outweighs its possible benefits. *See C & A Carbone*, 511 U.S. at 390. "[W]here other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach." *Philadelphia*, 437 So. 2d at 624. This approach was described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

The Reinishes assert that while they (and the class they seek to represent) are engaged in direct economic competition with Florida residents for the purchase of

real estate, the challenged exemption affords those persons who establish a Florida permanent residence a clear and continuing economic advantage over non-residents. First, eligible property is subject to an exclusion of the first $25,000 from ad valorem taxes. Second, any future increases in the assessed value of eligible property are limited to three per cent annually. Art. VII, § 4, Fla. Const.; § 193.155, Fla. Stat. (1997).

To support their argument that the Florida homestead tax exemption directly discriminates against nonresident consumers of Florida real estate, the Reinishes expressly rely on *Camps Newfound/Owatonna*, 520 U.S. at 564. The Maine statute at issue in that case provided a general exemption from real estate and personal property taxes for "benevolent and charitable institutions incorporated" by the State. With regard to institutions that were "in fact conducted or operated principally for the benefit of persons who are not residents of Maine," a charity could qualify only for a more limited tax benefit, and then only if the weekly charge for services provided did not exceed $30 per person. *See id.* at 568 & n.2. Because most of their campers came from out of state, the petitioners (non-profit summer camps) could not qualify for a total exemption; with a weekly tuition of about $400, they were ineligible for any charitable tax exemption at all. *See id.* at 568-69. For purposes of analysis under the Clause, the United States Supreme Court noted that the camps' "product" comprised the natural beauty of Maine as well as the special services provided by the camps. *See id.* at 576-77. From the face of the statute, the High Court concluded that the law discriminated against interstate commerce in that it expressly distinguished entities that

served mainly interstate clients from those that catered primarily to an intrastate market, and then it singled out camps that served principally Maine residents for beneficial tax treatment while it penalized other camps, which conducted mostly interstate business. *See id.* at 575-76. The statute included "a strong incentive for affected entities not to do business with nonresidents if they [were] able to do so to avoid the discriminatory tax." *Id.* at 578. As the burden of the facially discriminatory tax scheme "[fell] by design in a predictably disproportionate way on out-of-staters [footnote omitted], the pernicious effect on interstate commerce" was found to be "the same as in . . . cases involving taxes targeting out-of-staters alone." *Id.* at 579-80. Likening the Maine statute to an export tariff in terms of its function, the Court observed: "By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent." *Id.* at 578 & 580-81. Applying strict scrutiny, rather than a more deferential standard, because the statute was found to be facially discriminatory, the Court held the statute to be invalid and reversed the judgment of the Maine Supreme Judicial Court. *See id.* at 581-82, n. 16, & 595.

The instant trial court found that *Camps Newfound/Owatonna* is not applicable to the type of tax exemption scheme involved in the case at bar. Having carefully reviewed the facts in that case, we concur with the lower tribunal's determination that the facts in *Camps Newfound/Owatonna* are clearly distinguishable from the circumstances presented in the Florida homestead tax exemption provisions.

In analyzing the challenge to the state statute on Commerce Clause grounds in *Philadelphia*, the United States Supreme Court recognized that the essential inquiry must be whether the challenged provision "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." 437 U.S. at 624. A determination that a state regulation constitutes impermissible "economic protectionism" can be made based on either 1) a "discriminatory purpose," as was true of the Massachusetts pricing order, which had an "avowed purpose . . . to enable Massachusetts dairy farmers to compete with lower cost dairy farmers in other States," in *West Lynn Creamery*, 512 U.S. at 194; or 2) a "discriminatory effect," as was found in the North Carolina statutory restrictions upon grading apples in incoming closed containers in *Hunt*, 432 U.S. at 350-52. *See Bacchus Imports*, 468 U.S. at 270.

Addressing the first stage of the two-part analysis in Commerce Clause challenges, we conclude that the homestead tax exemption is not *per se* discriminatory against interstate commerce, for the provisions do not treat local and interstate commerce differently. We can discern neither a discriminatory purpose underlying the exemption nor an improper discriminatory effect on non-residents. In *Camps Newfound/Owatonna*, the exemption was facially discriminatory because it disparately treated identically positioned Maine non-profit camps depending on whether they favored in-state, rather than out-of-state, campers. *See* 520 U.S. at 582 n. 16. In contrast, the Florida homestead tax exemption neither distinguishes between Florida residents and non-residents nor disparately treats

identically situated persons. The focus of the exemption is on the use of the property itself, and not on the user. Entitlement to the exemption hinges upon whether the property is used as the "permanent residence." We cannot find any reasonable basis to support the Reinishes' claim that the exemption discriminates against interstate commerce. The historical justification of the homestead tax exemption is the protection of the home, a legitimate governmental purpose.

Although a foreign decision lacks precedential value, we find both instructive and useful the well-reasoned analysis set forth by the Appellate Court of Illinois in *Stahl v. Village of Hoffman Estates*, 694 N.E.2d 1102 (Ill. App. Ct. 1998). Under a 1987 ordinance adopted by the Village of Hoffman Estates, Illinois, the grantor of a deed conveying Village real property would incur transfer tax liability. In 1990, the Village raised the tax to $3.00 for every $1,000 valuation. However, the ordinance provided an exemption from payment of the tax for a grantor who had lived on the property for a year if he or she bought another residence in the Village within a certain period of time. Mr. Stahl and the other plaintiffs sold their homes in the Village and elected to move to places other than the Village, thereby incurring transfer tax liability. They joined in a constitutional attack upon the transfer tax and its exemption alleging, among other grounds, that it violated the Commerce Clause. Finding no violations of either the United States or Illinois Constitutions, the trial court granted the Village's motion to dismiss the suit. *See id.* at 1103-05.

Stahl and the other appellants conceded that the exemption did not substantially burden interstate commerce. Instead, they focused on the first step of the Commerce Clause analysis, alleging that the exemption facially discriminated against interstate commerce. The appellate panel noted that the exemption did not disproportionately burden non-residents, nor did it distinguish between residents of the Village and residents of another State. Rather, it differentiated between Village residents who sold their home and chose to repurchase a home in the Village, on the one hand, and Village resident sellers who elected to purchase a home anywhere else, on the other hand. The court noted that the "product"——the real estate——"cannot travel in interstate commerce." *Id.* at 1106. The appellants were not engaged in interstate commerce, and no interstate commerce activity was alleged to have increased the appellants' tax burden. *See id.* at 1107. The panel stated:

> The ordinance, with its exemption, does not impose a tax on people who leave the Village. It rewards the people who stay. In that way the Village promotes stability and continuity. That is a legitimate local purpose.

Id. Given these considerations, the court found no reason why the decision to leave the Village and, thus, to forego the tax exemption could be said to violate the Commerce Clause. The order of dismissal was affirmed. *See id.* at 1107-8.

Having found no facial discrimination against interstate commerce, we look to the second stage of the analysis under the Clause to determine whether the Florida homestead tax exemption imposes a burden on interstate

commerce that clearly outweighs its potential benefits. *See C & A Carbone*, 511 U.S. at 390; *Pike*, 397 U.S. at 142; Mary Lafrance, "Constitutional Implications of Acquisition-Value Real Property Taxation: Assessing the Burdens on Travel and Commerce," 1994 *Utah L. Rev.* 1027 (1994). The High Court in *Camps Newfound/Owatonna* stated that "[a] tax on real estate, like any other tax, may impermissibly burden interstate commerce." 520 U.S. at 574. As enunciated in *Pike* and *Philadelphia*, this step involves "a much more flexible approach" than the preliminary step. 437 U.S. at 624. We conclude that the Florida exemption is an even-handed regulation that promotes the legitimate, strong public interest in promoting the stability and continuity of the primary permanent home. The Reinishes have not shown either that the effects of the exemption upon interstate commerce are anything more than incidental, or that the burden imposed on such commerce is clearly excessive when compared to the asserted local benefits. Under these circumstances, the Court's criteria in *Pike* for upholding the regulation are met. Accordingly, we find that the count based on the "dormant" Commerce Clause was properly dismissed with prejudice.

The final order dismissing the Reinishes' second amended complaint with prejudice is AFFIRMED.

ALLEN, J., CONCURS; BENTON, J., CONCURS WITH OPINION.

BENTON, J., concurring.

I concur in the court's judgment and join Judge Browning's scholarly opinion except to the extent it endorses the result reached in *Stahl v. Village of Hoffman Estates*, 694 N.E.2d 1102 (Ill. App. Ct. 1998).

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

STANLEY REINISH AND **CAROL REINISH** individually and on behalf of all other similarly situated,

Plaintiffs,

Case No. CV 98-701

v.

JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County, Florida; **GARY NIKOLITIS**, in his official capacity as Property Appraiser of Palm Beach County, Florida; and, **L.H. FUCHS**, in his official capacity as executive Director of the Florida Department of Revenue,

Defendants.

_____/

FINAL ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE

The above styled case came before this court on the Defendants' Motion to Dismiss the Plaintiffs' Second Amended Complaint. Having reviewed the pleadings on file and having heard argument of counsel for the parties in this case, this Court finds as follows:

FACTS

1. By order of the Circuit Court of the 15th Judicial Circuit, venue in this case was transferred from Palm Beach County to Leon County.

2. Plaintiffs Stanley and Carol Reinish are residents of Chicago, Illinois. On or about September, 1994, Plaintiffs purchased a parcel of real estate located at 5950 Old Ocean Boulevard, in Ocean Ridge, Palm Beach County, Florida for use as a residence.

3. Since purchasing the real estate located at Ocean Ridge, Plaintiffs have traveled from their residence in Illinois to Florida in order to occupy their residence where they stay four to five months per year. They reside the rest of the year in Chicago.

4. The Plaintiffs have never filed for Homestead Exemption on their residence in Palm Beach County, pursuant to Section 196.011(1)(a), and Section 196.031, Florida Statutes, for 1994 or for any year *since* 1994.

5. The Plaintiffs, in their Second Amended Complaint, seek a declaration, pursuant to Chapter 86, Florida Statutes, that the provisions of Article VII, Section 6, Florida Constitution, and Section 196.031, Florida Statutes, are unconstitutional alleging that the Homestead Exemption is available only to "full time" residents of the State of Florida.

6. The Plaintiffs claim that the constitutional and statutory provisions of Florida law allegedly violate the Commerce Clause (Article I, Section 8, Clause 3, United States Constitution), the Privileges and Immunities Clause of the U.S. Constitution, (Article IV, Section 2,

Clause 1, United States Constitution), and the Equal Protection Clause of the Federal Constitution, together with the right to travel.

7. Furthermore, the Plaintiffs seek a refund of taxes paid by class members in each of the 67 Florida Counties which they would not have been required to pay had the homestead tax exemption been available to them. Finally, the Plaintiffs seek to have the Palm Beach Tax Collector be certified as the class representative defendant for all 67 Florida Tax Collectors.

8. The Defendants in their Motion to Dismiss the Second Amended Complaint, seek an order dismissing this action for lack of subject matter jurisdiction and for the Plaintiffs' failure to state a claim upon which the trial court could grant relief.

10. In the Motion to Dismiss, the Defendants also moved for an order dismissing the action as a class action designation pursuant to Fla. R. Civ. P. 1.220, on the grounds that there was no necessity for a class action when a statute is challenged involving either a plaintiff or a defendant class, and plaintiffs do not otherwise meet the conditions precedent to a class action designation.

11. Florida's Homestead Exemption contained in Article VII, Section 6, Florida Constitution and Section 196.031, Florida Statutes, does not impinge on anybodys decision to move to Florida or to establish a second home in Florida.

CONCLUSIONS OF LAW

12. This Court has jurisdiction pursuant to Chapter 86, Florida Statutes.

13. The Plaintiffs have standing to bring a facial challenge, testing the validity of Florida's Homestead Exemption contained in Article VII, Section 6, Florida Constitution and Section 196.031, Florida Statutes, as being in violation of the Commerce Clause, contained in Article I, Section 8, Clause 3, U.S. Constitution, and is squarely before this Court.

14. Florida's Homestead Exemption contained in Article VII, Section 6, Florida Constitution and Section 196.031, Florida Statutes, does not violate the Commerce Clause, contained in Article I, Section 8, Clause 3, U.S. Constitution.

15. A similar challenge was previously brought in Florida and decided adversely to the property owner. *See, Herzog v. Colding*, Case No. 85-2774-CA-01, *Final Summary Judgment*, (20th Judicial Circuit, March 10, 1987), *aff'd per curiam*, 525 So. 2d 888 (Fla. 2d DCA), *appeal dismissed*, 528 So. 2d 1182 (Fla. 1988). Further, this Court finds that *Camps Newfound/Owantonna, Inc., v. Town of Harrison, Maine*, 520 U.S. 564, 117 S.Ct. 1590 (1997), is not applicable to this type of taxing scheme. Also, this Court finds that the taxing scheme involved in the instant case is not retaliatory.

16. Plaintiffs' constitutional claims, asserted in this proceeding, are rejected by this Court because there is no basis under Florida law for any dwelling used only as a

vacation or seasonal residence being entitled to homestead tax relief, regardless of whether the owner is a resident of Florida or a resident of another state.

17. Florida's Homestead Exemption contained in Article VII, Section 6, Florida Constitution and Section 196.031, Florida Statutes, does not impinge on Plaintiffs' right to travel.

WHEREFORE it is

ORDERED AND ADJUDGED

18. The Plaintiffs' Second Amended Complaint is dismissed with prejudice.

19. The Plaintiffs shall go hence without day.

DONE and ORDERED in Tallahassee, Leon County, Florida, on this 24 day of August, 1998.

/s/ P. Kevin Davey
P. Kevin Davey
Circuit Court Judge
Second Judicial Circuit

Copies furnished to:

C. Oliver Burt, III
James K. Green
Michael J. Fried
Joel C. Meredeth
Brian Hanlon
Joseph C. Mellichamp, III
Jarrell L. Murchison

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO. 98-701

STANLEY REINISH and CAROL REINISH, individually and on behalf of all other similarly situated,

Plaintiffs,

vs.

JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County, Florida; GARY NIKOLITIS, in his official capacity as Property Appraiser of Palm Beach County, Florida; and L. H. FUCHS, in his official capacity as executive Director of the Florida Department of Revenue,

Defendants.

ORDER DENYING REHEARING

Plaintiffs, Stanley Reinish and Carol Reinish, timely seek rehearing of the Court's Final Judgment dated August 24, 1998, which dismissed their second amended complaint with prejudice. Rehearing is not warranted in this case. The Court considered each of the Plaintiffs' constitutional theories and rejected them.[1]

[1] Defendants raised lack of standing since Plaintiffs have never applied for the homestead tax exemption, a statutory prerequisite to obtaining the tax relief. While dismissal on this ground is appealing procedurally, the constitutional challenges on this ground are squarely alleged in the amended complaint. Dismissal on the basis of standing merely postpones the inevitable obligation to rule on the merits of the challenges.

To the extent the prior order may have lacked specificity on the equal protection argument, this Court makes the following, additional findings. The Equal Protection clause is not implicated by Florida's Homestead Exemption provision. Like the Plaintiffs, who have chosen to make Illinois their residence, some Florida residents also are privileged to have a second or vacation home in Florida. By law, none of these Floridian's secondary residences are entitled to the homestead exemption. Thus, the out-of-state residents and the Florida residents receive equal treatment under this provision of the Florida Constitution. Accordingly, it is

ORDERED and ADJUDGED that the Motion for Rehearing filed by the Plaintiffs on September 1, 1998 is **denied.**

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida on this 30th day of September, 1998.

/s/ P. Kevin Davey
P. KEVIN DAVEY,
Circuit Judge

Copies furnished to:

C. Oliver Burt, III Esquire
James K. Green, Esquire
Michael J. Fried, Esquire
Joel C. Meredeth, Esquire
Brian Hanlon, Esquire
Joseph C. Mellichamp, III, Esquire

Supreme Court of Florida

WEDNESDAY, OCTOBER 18, 2000

CASE NO.: SC00-1705
Lower Tribunal No.: 1D98-3973

JOHN K. CLARK, ETC., ET AL. vs. STANLEY REINISH, ET AL.

Petitioner(s) Respondent(s)

Petitioner having filed proper notice of dismissal pursuant to Florida Rule of Appellate Procedure 9.350(b), it is ordered that the petition for review be and the same is hereby dismissed.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bm
Served:

HON. JON S. WHEELER, CLERK
JARRELL L. MURCHISON
JOSEPH C. MELLICHAMP, III
JOEL MEREDETH
HARRY O. THOMAS
JAMES K. GREEN
MICHAEL J. FREED
C. OLIVER BURT, III
M. DAVID GELFAND
BRIAN T. HANLON

Supreme Court of Florida

MONDAY, APRIL 23, 2001

CASE NO.: SC00-1703
Lower Tribunal No.: 1D98-3973

STANLEY REINISH, ET AL. vs. JOHN K. CLARK, ETC., ET AL.

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

WELLS, C.J., and ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON. JON S. WHEELER, CLERK
C. OLIVER BURT, III
NINA M. ZOLLO
M. DAVID GELFAND
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HARRY O. THOMAS

MICHAEL J. FREED
BRIAN T. HANLON
JARRELL L. MURCHISON
JOSEPH C. MELLICHAMP, III
HON. BOB INZER, CLERK
HON. P. KEVIN DAVEY, JUDGE

United States Constitution, Article IV, § 2, cl. 1
The Privileges and Immunities Clause

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Article I, § 8, cl. 3
The Commerce Clause

The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . .

United States Constitution, Article XIV, § 1
The Equal Protection Clause

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution, Article VII, § 4(c)

Art. VII, § 4. Taxation; assessments

By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided. . . .

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead

assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

(A) three percent (3%) of the assessment for the prior year.

(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.

6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.

7. The provisions of this amendment are severable. If any of the provisions of this amendment shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any remaining provisions of this amendment.

Florida Constitution, Article VII, § 6

Art. VII, § 6. Homestead exemptions

(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.

(b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value

of the proportion which the interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption shall be increased to a total of twenty-five thousand dollars of the assessed value of the real estate for each school district levy. By general law and subject to conditions specified therein, the exemption for all other levies may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently disabled and if the owner is not entitled to the exemption provided in subsection (d).

(d) By general law and subject to conditions specified therein, the exemption shall be increased to a total of the following amounts of assessed value of real estate for each levy other than those of school districts: fifteen thousand dollars with respect to 1980 assessments; twenty thousand dollars with respect to 1981 assessments; twenty-five thousand dollars with respect to assessments for 1982 and each year thereafter. However, such increase shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of section 4 by a state agency designated by general law. This subsection shall stand repealed on the effective date of any amendment to section 4 which provides for the assessment of homestead property at a specified percentage of its just value.

(e) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are

permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

(f) The legislature may, by general law, allow counties or municipalities, for the purpose of their respective tax levies and subject to the provisions of general law, to grant an additional homestead tax exemption not exceeding twenty-five thousand dollars to any person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner and who has attained age sixty-five and whose household income, as defined by general law, does not exceed twenty thousand dollars. The general law must allow counties and municipalities to grant this additional exemption, within the limits prescribed in this subsection, by ordinance adopted in the manner prescribed by general law, and must provide for the periodic adjustment of the income limitation prescribed in this subsection for changes in the cost of living.

Florida Statutes, § 196.012(17) and § 196.012(18)

§ 196.012. Definitions.

For the purpose of this chapter, the following terms are defined as follows, except where the context clearly indicates otherwise: . . .

(17) "Permanent resident" means a person who has established a permanent residence as defined in subsection (18).

(18) "Permanent residence" means that place where a person has his or her true, fixed, and principal home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred.

Florida Statutes, § 196.015

§ 196.015. Permanent residency; factual determination by property appraiser

Intention to establish a permanent residence in this state is a factual determination to be made, in the first instance, by the property appraiser. Although any one factor is not conclusive of the establishment or non-establishment of permanent residence, the following are relevant factors that may be considered by the property appraiser in making his or her determination as to the intent of a person claiming a homestead exemption to establish a permanent residence in this state:

(1) Formal declarations of the applicant.

(2) Informal statements of the applicant.

(3) The place of employment of the applicant.

(4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.

(5) The place where the applicant is registered to vote.

(6) The place of issuance of a driver's license to the applicant.

(7) The place of issuance of a license tag on any motor vehicle owned by the applicant.

(8) The address as listed on federal income tax returns filed by the applicant.

(9) The previous filing of Florida intangible tax returns by the applicant.

Florida Statutes, § 196.031

§ 196.031 – Exemption of homesteads

(1) Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $5,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. Such title may be held by the entireties, jointly, or in common with others, and the exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear. If only one of the owners of an estate held by the entireties or held jointly with the right of survivorship resides on the property, that owner is allowed an exemption of up to the assessed valuation of $5,000 on the residence

and contiguous real property. However, no such exemption of more than $5,000 is allowed to any one person or on any one dwelling house, except that an exemption up to the assessed valuation of $5,000 may be allowed on each apartment or mobile home occupied by a tenant-stockholder or member of a cooperative corporation and on each condominium parcel occupied by its owner. Except for owners of an estate held by the entireties or held jointly with the right of survivorship, the amount of the exemption may not exceed the proportionate assessed valuation of all owners who reside on the property. Before such exemption may be granted, the deed or instrument shall be recorded in the official records of the county in which the property is located. The property appraiser may request the applicant to provide additional ownership documents to establish title.

(2) As used in subsection (1), the term "cooperative corporation" means a corporation, whether for profit or not for profit, organized for the purpose of owning, maintaining, and operating an apartment building or apartment buildings or a mobile home park to be occupied by its stockholders or members; and the term "tenant-stockholder or member" means an individual who is entitled, solely by reason of his or her ownership of stock or membership in a cooperative corporation, as evidenced in the official records of the office of the clerk of the circuit court of the county in which the apartment building is located, to occupy for dwelling purposes an apartment in a building owned by such corporation or to occupy for dwelling purposes a mobile home which is on or a part of a cooperative unit. A corporation leasing land for a term of 98 years or more for the purpose of maintaining and

operating a cooperative thereon shall be deemed the owner for purposes of this exemption.

(3) (a) For every person who is entitled to the exemption provided in subsection (1), who is a permanent resident of this state, and who is 65 years of age or older, the exemption is increased to $10,000 of assessed valuation for taxes levied by governing bodies of counties, municipalities, and special districts.

(b) For every person who is entitled to the exemption provided in subsection (1), who has been a permanent resident of this state for the 5 consecutive years prior to claiming the exemption under this subsection, and who qualifies for the exemption granted pursuant to s. 196.202 as a totally and permanently disabled person, the exemption is increased to $9,500 of assessed valuation for taxes levied by governing bodies of counties, municipalities, and special districts.

(c) No homestead shall be exempted under both paragraphs (a) and (b). In no event shall the combined exemptions of s. 196.202 and paragraph (a) or paragraph (b) exceed $10,000.

(d) For every person who is entitled to the exemption provided in subsection (1) and who is a permanent resident of this state, the exemption is increased to a total of $25,000 of assessed valuation for taxes levied by governing bodies of school districts.

(e) For every person who is entitled to the exemption provided in subsection (1) and who is a resident of this state, the exemption is increased to a total of $25,000 of assessed valuation for levies of taxing authorities other than school districts. However, the increase provided in this paragraph shall not apply with respect to the assessment roll of a county unless

and until the roll of that county has been approved by the executive director pursuant to s. 193.1142.

(4) The property appraisers of the various counties shall each year compile a list of taxable property and its value removed from the assessment rolls of each school district as a result of the excess of exempt value above that amount allowed for nonschool levies as provided in subsections (1) and (3), as well as a statement of the loss of tax revenue to each school district from levies other than the minimum financial effort required pursuant to s. 236.02(6), and shall deliver a copy thereof to the Department of Revenue upon certification of the assessment roll to the tax collector.

(5) The exemption provided in this section applies only to those parcels classified and assessed as owner-occupied residential property or only to the portion of property so classified and assessed.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO. CL 97 004672 AJ

STANLEY REINISH and CAROL REINISH, individually and on behalf of all others similarly situated, Plaintiffs, v. JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County and as representative of other county tax collectors in the State of Florida, GARY NIKOLETS, in his official capacity as Property Appraiser of Palm Beach County, and L. H. FUCHS, in his official capacity as Executive Director of the Florida Department of Revenue, Defendants.	CLASS REPRESENTATION

SECOND AMENDED COMPLAINT

For their complaint, the Plaintiffs, individually and on behalf of a class of all others similarly situated, allege:

JURISDICTION AND VENUE

1. This court has jurisdiction over this action pursuant to Art. V, § 20(c)(3), Fla. Const. in that this case involves the legality of an exemption from taxation. The jurisdiction of this court is also predicated upon the Declaratory Judgment Act, §§ 86.011, 86.021, 86.061, Fla. Stat. and § 26.012(2)(e), Fla. Stat.

2. This action seeks a declaration that Art. VII, § 6, Fla. Const. and § 196.031, Fla. Stat. (the "Homestead Tax Exemption"), violate Art. I § 8 of the United States Constitution (the Commerce Clause), Article IV § 2 of the United States Constitution, (the Privileges and Immunities Clause), and Equal Protection of Laws as guaranteed by the Fourteenth Amendment to the United States Constitution to the extent that the Homestead Tax Exemption provided by those provisions is available only to full time residents of Florida. Plaintiffs seek a refund of such portion of the residential real estate taxes paid by Plaintiffs and the Class, which they would not have been required to pay had the Homestead Tax Exemption been available to them. They also seek a declaration of the rights of the parties and injunctive relief.

3. Venue is proper within this circuit pursuant to §§ 47.011 and 194.171, Fla. Stat.

PARTIES

4. Plaintiffs Stanley and Carol Reinish are residents of Chicago, Illinois. On or about September, 1994, Plaintiffs purchased a parcel of real estate located at 5950 Old Ocean Boulevard, in Ocean Ridge, Palm Beach County,

Florida for use as a residence. Since purchasing the residence at Ocean Ridge, Plaintiffs have paid real estate taxes as assessed on the residence but have been ineligible to receive an exemption on the first $25,000 of assessed value because they are not full-time residents of the State of Florida. Since purchasing the real estate located at Ocean Ridge, Plaintiffs have traveled from their residence in Illinois to Florida in order to occupy their residence, where they stay approximately four to five month per year. They reside the rest of the year in Chicago. As part-time Florida residents, Plaintiffs have used fewer public services than full-time residents, but have been taxed on the property at a higher rate due to the unavailability to them of the Homestead Tax Exemption.

5. Defendant John K. Clark is being sued herein in his official capacity as Tax Collector of Palm Beach County. Defendant Clark is charged with the responsibility of collecting the taxes in question. He is sued in his official capacity and as representative of a Defendant class of all other County Tax Collectors in the State.

6. Defendant Gary Nikolets is being sued herein in his official capacity as Property Appraiser of Palm Beach County. He is the constitutional officer charged with assessing all property in Palm Beach County and for reviewing and/or approving applications for tax exemptions. (Plaintiffs, however, contend that this case is not a challenge to the Property Appraiser's determination of Plaintiffs' eligibility to receive a homestead exemption.)

7. The Florida Department of Revenue Division of Ad Valorem taxation is charged by statute (§ 20.213(b),

Fla. Stat.) with the responsibility of carrying out the relevant provision of the ad valorem tax law.

8. Defendant L. H. Fuchs is its Executive Director of the Florida Department of Revenue.

CLASS REPRESENTATION ALLEGATIONS

9. This cause of action is maintainable on behalf of a class under Fla. R. Civ. P. 1.220(b)(2) and (3). The Class is defined as all owners of Florida residential real estate who are not full-time residents of Florida and for that reason have been ineligible for the Homestead Tax Exemption.

10. There is a clearly defined community of interest in the questions of law and fact affecting the parties to be represented in this action. The questions of law and fact common to the class predominate over any questions which may affect individual Class members. Among such questions of law and fact are: a) whether Art. VII, § 6, Fla. Const. and § 196.031 by exempting from taxation certain portions of the assessed value of residential real estate, but only for full-time Florida residents, discriminate against and unduly burden interstate commerce and thus violate the Interstate Commerce Clause of the United States Constitution; (b) whether Art. VII, § 6 Fla. Const. and § 196.031 constitute an impermissible restriction on the right to travel interstate and the Privileges and Immunities Clause of the United States Constitution; and, (c) whether these provisions deny Plaintiffs and the Class equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

11. Plaintiffs' claims are typical of the claims of the class. Plaintiffs and all members of the class were injured and have sustained damages as a result of the unconstitutional provisions complained of herein. Plaintiffs are the owners of Florida residential real estate but are not full-time Florida residents. Plaintiffs have been ineligible for the exemption on real estate taxes afforded by § 196.031 solely because they were not and are not full-time Florida residents.

12. Although the exact number of class members is unknown to Plaintiffs at this time and can be determined only by appropriate discovery, Plaintiffs believe and accordingly allege that the number of Class members numbers is in the thousands. The Class is, therefore, so numerous that joinder is impracticable.

13. The named Plaintiffs bring this action on behalf of all persons, excluding the Defendants named herein or any of the Defendants' affiliates, who have been ineligible for the Homestead Tax Exemption because they were not full-time Florida residents.

14. Plaintiffs will fairly and adequately protect and represent the interests of the Class and have retained counsel competent and experienced in class action litigation. The Plaintiffs have been ineligible for the Homestead Tax Exemption based on the same essential circumstances and have an interest in obtaining the return of their money assessed under an unconstitutional statute.

15. A class action is superior to other available methods for the fair and efficient adjudication of this controversy given the predominance of common issues of

law and fact relating to the constitutionality of Art. VII, § 6, Fla. Const. and § 196.031 which affects each of the individual members of the Class:

a. a class is appropriate in this case because each member of the Class could not independently and efficiently prosecute the constitutional claims involved given that the amount of the Homestead Tax Exemption in any individual case is far less than the amount which would be spent in bringing and prosecuting an action challenging the constitutionality of this Florida statute and Constitutional provision;

b. the named class representative is not a party in any other pending litigation to which any question of law or fact controverted in the subject action will be adjudicated;

c. it is also desirable to concentrate this litigation in a single forum for efficiency reasons rather than bringing numerous actions in separate courts throughout the state; separate actions would result in duplicative discovery, pleadings, motions, and potentially varying adjudications; and

d. there will be no difficulty in the management of this action as a class action particularly given the lack of any variation in the class members' claims.

DEFENDANT CLASS ALLEGATIONS

16. This action is brought against a Defendant Class of all County Tax Collectors in the State of Florida. Defendant Clark is sued as its representative. Each member of

the Defendant Class has collected property taxes based upon the same invalid statutory provisions under which Plaintiffs and the Class are ineligible for the Homestead Tax Exemption.

17. The claims of Plaintiffs and the Class against Defendant Clark are typical of the claims of the Class against each County Tax Collector within the State of Florida.

18. Defendant Clark will fairly and adequately protect and represent the interests of the Defendant Class.

19. Maintaining this action against a Defendant Class is superior to other available methods for the fair and efficient adjudication of this action given the predominance of common issues of law and fact as previously alleged. Prosecuting this action as a Defendant Class will permit the litigation to be centralized in one forum, will further the interests of judicial economy, and avoid duplicative litigation with possibly inconsistent results.

FACTUAL BACKGROUND

20. Art. VII, § 6, Fla. Const. provides that every person who has legal or equitable title to real estate and maintains upon it his permanent residence or the permanent residence of another legally or naturally dependent upon him shall be exempt from tax thereon, except assessments for special benefits, up to an assessed valuation of $5,000. Section 6 further provides that by general law the exemption shall be increased to a total of $25,000 of the assessed value of the real estate for each school

district levy; and that the exemption for all other levies may be increased up to an amount not exceeding $10,000 of the assessed value of the real estate if the owner has attained the age of 65 or is totally and permanently disabled and not entitled to the exemptions provided by subsection (d). Pursuant to 6(d) of Art. VII, the Homestead Tax Exemption has been increased to $25,000 of the assessed value of Homestead real estate for each levy other than school district levies.

21. Of equal, if not greater significance than the reduction in real estate taxes caused by the Homestead Tax Exemption is the protection which it affords against later increases in assessed value. Art. VII, § 4, Fla. Const. as amended provides a "cap" on the annual assessment of real estate qualifying for the Homestead Tax Exemption. Under this provision, assessments on Homestead real estate may not increase yearly by more than three percent (3%) of the prior year's assessment or the percentage change in the Consumer Price Index, *whichever is less.* This provision accords holders of a Homestead Exemption a significant economic advantage over other owners of residential real estate by limiting substantially their exposure to increased tax assessments.

22. Pursuant to Art. VII, § 6, Fla. Const., the legislature enacted § 196.031 providing for certain exemptions with respect to persons who own real estate in the state and reside thereon as their permanent residence. § 196.015 provides that intention to establish a permanent residence is a factual determination to be made in the first instance by the property appraiser.

23. The named Plaintiffs are residents of Illinois who have purchased residential real estate in Palm Beach County which they occupy as a residence for approximately four to five months per year. Accordingly, under the statutory scheme set forth in Art. VII, § 6, Fla. Const., and § 196.031, Fla. Stat., they are not entitled to the Homestead Tax Exemption. This is true despite the fact that as part time residents of Palm Beach County, the named Plaintiffs use fewer governmental services provided by the County and its subdivisions and thus represents a lesser tax burden than individuals who are full-time residents of Palm Beach County.

24. In making the Homestead Tax Exemption available only to full-time residents of Florida who use the real estate as their permanent residence, Art. VII, § 6 of the Constitution and Title 196.031, the State of Florida has chosen to create two classifications of taxpaying owners of residential real estate, to discriminate against those whose full-time residence is out of state, and to provide a direct economic advantage with regard to the taxation of residential real estate to those whose full-time residence is within the state. In so doing the Constitutional provision and the Statute discriminate against and unduly burden Interstate Commerce.

25. There is no economic justification for denying Plaintiffs and the Class the benefit of the Homestead Tax Exemption since persons who own residential real estate in the State of Florida but are not full-time residents do not impose the same demands on the services rendered by the State of Florida and its subdivisions. Based upon the level of services which they utilize, it is the real estate taxes of Plaintiffs and the Class which should be reduced,

not the taxes of full-time residents. The provisions in question deny and impinge on the exercise of fundamental rights, have no rational justification, and serve only to benefit arbitrarily persons whose full-time residence is within the State of Florida. As such, the provisions violate the privileges and immunities clause of the United States Constitution and are void.

COUNT I

26. Plaintiffs incorporate and reallege paragraphs 1 through 25 as if fully rewritten herein.

27. In denying the Homestead Tax Exemption to Plaintiff and the Class solely on the basis of out of state residency the Constitutional provision and § 196.03 have created a classification and/or distinction which is wholly arbitrary and discriminatory which denies Plaintiffs and the Class equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Plaintiffs respectfully pray that the Court order as follows:

a. Declare this action to be a proper class action appointing the named Plaintiffs as class representatives and the undersigned counsel as counsel for the class;

b. Declaring Art. VII, § 6 and § 196.031, Fla. Stat. in violation of the Equal Protection Provision of the Fourteenth Amendment to the United States Constitution.

c. Ordering Defendants to provide an accounting of and to refund all monies collected

from Plaintiffs and members of the Class by virtue of the unavailability to them of the Homestead Exemption as set forth in § 196.031;

d. Ordering reasonable attorneys fees to Plaintiffs;

e. Ordering reimbursement to Plaintiffs of the costs of suit incurred herein including any expert fees; and

f. Granting such other and further relief as may be deemed just and proper.

COUNT II

28. Plaintiffs incorporate and reallege paragraphs 1 through 25 as if fully rewritten herein.

29. Art. VII, § 6, Fla. Const. and § 196.031, Fla. Stat. unconstitutionally infringe on the right to travel interstate and the right to own property in violation of the privileges and immunities clause of article IV, Section 2 of the United States Constitution. For the reasons previously described, both provisions discriminate impermissibly between full-time residents and part-time residents of the State of Florida, both jeopardize the fundamental rights to travel interstate and to own property and both bear no rational connection to any valid concern of the defendants.

30. Furthermore, there is no rational justification for these provisions in that part-time residents of the state who are not eligible for the Homestead Tax Exemption make lesser demands and impose lesser burdens upon the State of Florida and its subdivisions including those

for whose benefit the tax is supposedly collected, and utilize fewer services than full-time residents of the state.

WHEREFORE, Plaintiffs respectfully pray that the Court order as follows:

a. Declare this action to be a proper class action appointing the named Plaintiffs as class representatives and the undersigned counsel as counsel for the class;

b. Declaring Art. VII, § 6 and § 196.031, Fla. Stat. unconstitutional in violation of the Privileges and Immunities Clause of the United States Constitution;

c. Ordering Defendants to provide an accounting of and to refund all monies collected from Plaintiffs and members of the Class by virtue of the unavailability to them of the Homestead Exemption as set forth in § 196.031;

d. Ordering reasonable attorneys fees to Plaintiffs;

e. Ordering reimbursement to Plaintiffs of the costs of suit incurred herein including any expert fees; and

f. Granting such other and further relief as may be deemed just and proper.

COUNT III

31. Plaintiffs incorporate and reallege paragraphs 1 through 25 as if fully rewritten herein.

32. § 196.031, Fla. Stat. and Art. VII, § 6. Fla. Const. constitute a *per se* violation of the Commerce Clause of the United States Constitution, Article I, Section 8. These

provisions violate the Commerce Clause prohibition on statutes which attempt to create customs duties, barriers or taxes which discriminate against and unduly burden interstate commerce.

33. These provision also impermissibly impose a "tariff" upon citizens whose primary residence is located outside the State of Florida by requiring them to pay an extra portion of real estate taxes upon residential real estate owned by them in Florida which full-time residents of the State are not required to pay. The statute impermissibly discriminates against out-of-state purchasers of Florida residential real estate and provides an economic advantage in that regard to full-time residents of the state.

WHEREFORE, Plaintiffs respectfully pray that the Court order as follows:

a. Declare this action to be a proper class action appointing the named Plaintiffs as class representatives and the undersigned counsel as counsel for the class;

b. Declaring art. VII, § 6, Fla. Const. and § 196.031, Fla. Stat. unconstitutional in violation of Article I, Section 8 – the Commerce Clause of the United States Constitution;

c. Ordering Defendants to provide an accounting of and to refund all monies collected from Plaintiffs and members of the Class by virtue of the unavailability to them of the Homestead Exemption as set forth in § 196.031;

d. Ordering reasonable attorneys fees to Plaintiffs;

e. Ordering reimbursement to Plaintiffs of the costs of suit incurred herein including any expert fees; and

f. Granting such other and further relief as may be deemed just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished, by U.S. Mail, on this 2 day of January, 1998, to **Joseph C. Mellichamp, III, Esq.**, Senior Assistant Attorney General and **Jarrell L. Murchison, Esq.**, Assistant Attorney General, Office of Robert A. Butterworth Attorney General, The Capitol – Tax Section, Tallahassee, Florida 32399-1050; and **Brian Hanlon, Esq.**, General Counsel, Palm Beach County Tax Collector's Office, 301 N. Olive Avenue, Third Floor, West Palm Beach, Florida 33401.

Respectfully submitted,

/s/ James K. Green
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 98-701

STANLEY REINISH and CAROL REINISH, individually and on behalf of all others similarly situated,

CLASS REPRESENTATION

Plaintiffs/Appellants,

v.

JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County and as representative of other county tax collectors in the State of Florida; GARY NIKOLIS, in his official capacity as Property Appraiser of Palm Beach County; and L.H. FUCHS, in his official capacity as Executive Director of Florida Department of Revenue,

Defendants/Appellees.
_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that Stanley Reinish and Carol Reinish, Plaintiffs/Appellants, individually and on behalf of all others similarly situated, appeal to the First District Court of Appeal, the Final Judgment entered by the Honorable P. Kevin Davey on August 24, 1998, rendered by Order Denying Rehearing on September 30, 1998.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Joseph C. Mellichamp, III, Senior Assistant Attorney General, Jarrell L. Murchison, Assistant Attorney General, Office of the Attorney General, The Capitol – Tax Section, Tallahassee, FL 32399-1050, Brian Hanlon, General Counsel of Palm Beach County Tax Collector's Office, 301 N. Olive Avenue, Third Floor, West Palm Beach, FL 33401, this 20th day of October, 1998, via U.S. Mail.

Respectfully submitted,

By: /s/ C. Oliver Burt, III
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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 98-701

STANLEY REINISH and CAROL REINISH, individually and on behalf of all others similarly situated, Plaintiffs, v. JOHN K. CLARK, in his official capacity as Tax Collector of Palm Beach County and as representative of other county tax collectors in the state of Florida; GARY NIKOLITS, in his official capacity as Property Appraiser of Palm Beach County; and L.H. FUCHS, in his official capacity as Executive Director of the Florida Department of Revenue, Defendants.	CLASS REPRESENTATION

MOTION HEARING

The above-entitled matter came on to be heard before the Honorable P. KEVIN DAVEY, Circuit Court Judge, at the Leon County Courthouse, Tallahassee, Florida, on May 15, 1998, commencing at 9:15 a.m.

Reported by:

ELIZABETH KICKHAM

Court Reporter

COPY

FOR THE RECORD REPORTING TALLAHASSEE, FLA
850-222-5491

[2] APPEARANCES OF COUNSEL:

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[3] PROCEEDINGS

THE COURT: We are here on the case of Stanley Reinish and Carol Reinish versus John K. Clark, et al., Case 98-701, and we here on a motion to dismiss.

Let me – let's, I guess what we need to do is let's get everybody's appearances and who they're representing at this point, for my benefit and for the court reporter's, too.

MR. BURT: Oliver Burt, representing the Plaintiffs.

THE COURT: I'm sorry, how do you spell your last name?

MR. BURT: B-u-r-t.

THE COURT: Okay.

MR. GREEN: James K. Green, also representing the Plaintiffs.

MR. THOMAS: Harry O. Thomas, law firm of Cummings and Thomas here in Tallahassee, on behalf of the Plaintiffs.

MR. MELLICHAMP: Joseph Mellichamp, Senior Assistant Attorney General, representing the Department of Revenue.

MR. MURCHISON: Jerrell Murchison, Assistant Attorney General, representing the Department of Revenue.

[4] MR. KELLER: Stephen Keller, Office of General Counsel, Department of Revenue. I'm not an attorney in the case.

THE COURT: All right. Who's going to argue this? Mr. Mellichamp?

MR. MELLICHAMP: I am, Your Honor.

THE COURT: Okay.

MR. MELLICHAMP: Your Honor, we're here on a motion to dismiss in a case that is basically an ad valorem refund case, in which the Plaintiffs seek to have declared unconstitutional Article 76, which is the homestead exemption statute for ad valorem taxes and – together with Section 196.031, which is the Florida statute that implements the homestead exemption provision.

In this case, the Plaintiffs in paragraph 4 of their complaint set out what the facts are and this is a four corners motion to dismiss based on the facts alleged in the complaint, Your Honor.

In that paragraph, if I may, the Plaintiffs state that Stanley and Carol Reinish are residents of Chicago, Illinois, and that on or about September of 1994 they purchased real estate in Palm Beach County for use as a residence. And I'm paraphrasing the paragraph.

[5] Since purchasing the residence in ocean Ridge, Palm Peach County, they paid real estate taxes as assessed on the residence. They then make the legal conclusion that they had been ineligible to receive the exemption of the first $25,000 of assessed value because they're not full-time residents of the state of Florida. That's another assumption that I'll get to in a moment, Your Honor.

Since purchasing the real estate in Ocean Ridge, the Plaintiffs have traveled from their residence in Illinois to

Florida in order to occupy their residence in Florida, where they stay for four or five months per year. They reside the rest of the year in Chicago.

Then they allege that as part-time Florida residents they use fewer public services than full-time residents, but have been taxed on the property at a higher rate because of the unavailability of the homestead tax exemption.

Now, there's nothing – there are no facts in this complaint, Your Honor, that establish that the Plaintiffs are either eligible or ineligible for homestead exemption. This is so for several reasons. One, the requirement for homestead exemption is not a durational residency requirement in which the [6] complaint attempts to cast it. You don't have to live in Florida for any number of months. It is an intent statute, and as Section 96.012(17) and (18) point out, when it defines "permanent residence," that's in Section 196.012(18), means a place where a person has his or her true fixed permanent home and principal establishment to which whenever absent he or she has the intention of returning.

It's similar in probate to domicile, and the only requirement is that on January 1 you use it as such. You don't have to be in it on January 1, you have to have the intent that this is your home.

Then the Constitution – and this is a key thing in this case – the Constitution, as well as the statute, 196.012(18), as well as 196.031, provides that a person may have only one permanent residence at a time, and once a permanent residence is established in a foreign state or country, it's

presumed to continue until a person shows that a change has occurred.

Now, there's nothing in the complaint that the Plaintiffs allege that they have a permanent residence anywhere. They have two residences and they freely travel back and forth from Chicago to Florida to use one of their residences and then use the other [7] residence.

Now, understanding the facts as the Plaintiffs have alleged them, and understanding that neither the Constitution nor the statute require that a property owner be a citizen of the United States or of this state in order to be eligible for a homestead exemption, nor is there a durational residency requirement.

Then we turn to what have the Plaintiffs done to bring themselves before this Court? First, they failed to comply with the mandatory provisions of Section 196.011(1), which says everyone has to file an application for an exemption, and if they fail to file in any particular year, they lose or forfeit the exemption for that year, the exact language of the statute, Your Honor.

THE COURT: I know what it says.

MR. MELLICHAMP: Okay. There's no allegation that they ever applied for and got turned down for an homestead exemption. There is allegations that they paid tax since 1994. I would assume that would be tax year '95, '96 and '97. They've been assessed every year, paid those taxes, have never challenged those taxes under the provisions of Section 194.171, which says you have to challenge your taxes within 60 days [8] of receiving them.

That brings us to this case, Your Honor. They failed to comply with 196.011(1), and failing to comply with that, they waive the exemption for a year. They failed to comply with 194.171, and the failure to comply with that makes that assessment or those assessments for those years final and unchallengeable. They have now attempted to bring a refund action, and as the case of Department of Revenue versus Stafford from the Fourth District Court of Appeals points out, you can't use – in ad valorem, you can't use a refund action to get around the 60 days of each assessment year.

As the Macadamia Housing Authority case from the First District points out, exemptions are included within the 60-day assessment time-barred period of 194.171.

And as Hirsch v. Cruz out of the First District tells us, and this gets to their class that they purport to represent, for ad valorem purposes, you can't have a class action unless the named individuals and the class have all complied with the time periods in 194.171. And these aren't statutory time periods or statute of limitations, they're statute of non-claim, which means at the end of the period not only [9] does the cause of action disappear, but the right to bring the action disappears, as opposed to a statute of limitations which only affects the ability to bring it, not the action itself.

For all of the years in question, they're all time-barred. There is no jurisdiction in this court to consider any of the years that they own this residence and pay taxes on it. There is no jurisdiction in this court to grant a refund for any of those years.

And they had couched this case in the form of a Chapter 86 action. And as the Ray Construction case teaches us, again, a First District Court of Appeals case, you can't use – and that dealt with an excise tax statute, which has the same 60-day period in Chapter 72 – you can't use Chapter 86 to get around the 60-day time bar period of non-claim.

So it brings us to back to this case. There are no allegations they have met any of these periods.

Now, I would assume that Plaintiff will say, well, under various U.S. Supreme Court decisions, including McKesson, that we have a right to have our case heard and get our refund. But as the Court is aware, in the McKesson case, which I'm aware of because I was an attorney of record, the United States [10] Supreme Court, when it was talking about the harm that the refund in McKesson would do to the state treasury pointed out, at page 44 of 496 U.S., that, "A state's freedom to impose various procedural requirements on actions for post-deprivation relief sufficiently meets this concern with respect to future cases." They're talking about harm the state treasury.

"The state might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; executed any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions." And the United States Supreme Court in that case invited the states to do that.

In the area of ad valorem taxes, the Legislature has done that, Your Honor. It has imposed a 60-day time

period. The Plaintiffs' actions in this case have not, as far as the complaint is concerned, have not been brought within those time periods which the Florida Supreme Court has upheld as being reasonable and violative of due process.

THE COURT: Okay. I think I've got your argument.

Who's going to argue on behalf of the [11] Plaintiffs?

MR. GREEN: Your Honor, I'm going to primarily argue the procedural and substantive constitutional claims, and Mr. Burt here is going to argue the class action aspects of the motion to dismiss.

As we indicated before, I'm James Green, and along with Ollie Burt, we're from West Palm Beach. Harry Thomas is from Tallahassee.

At the outset it should be noted that the Defendants filed their motion to dismiss on January 9, alleging some grounds, and then filed a memorandum of law on Wednesday, which I got Wednesday night when I returned to my office, which raises different grounds.

Neither the Defendants' motion nor their memo cite three dispositive precedents. One is their Kuhnlein against the Department of Revenue case which was decided by the Florida Supreme Court three and a half years ago. They don't cite Hammerhoff, which is a recent First District Court of Appeal case, which I well get to in a moment, nor do they cite the Camp Newfound case, which a U.S. Supreme Court case decided one year ago.

Before we get into a discussion of those precedents, I think it's helpful to discuss what this case is and what it is not.

[12] Under this second amended complaint, opposing counsel omitted a number of allegations. First, Plaintiffs allege in paragraph 4 that they are residents of Chicago, Illinois. They also allege in that same paragraph of the second amended complaint that they reside in Chicago seven to eight months a year. Actually, what they allege is they reside in Florida four to five months, which by inference means seven to eight months a year in Chicago.

And in paragraph 11 and in paragraph 23 they allege that they are ineligible for the homestead exemption. We have clearly indicated that they are not eligible for the homestead exemption, thereby conferring standing upon them to challenge this exemption.

Defendants are correct that Plaintiffs never challenged the assessment on their property, nor have they ever applied for or received a tax exemption. They're simply ineligible. The law of Florida does not require one to exhaust administrative remedies where the administrative tribunal cannot grant relief. In this case the administrative tribunal, neither the tax collector, the property appraiser or the Department of Revenue, can grant an exemption to which people are not eligible.

[13] THE COURT: Let me ask you this question. They claim primary residency in Illinois. Is there any dispute that they obtain some sort of a homestead exemption in Illinois on their Illinois property?

MR. GREEN: First of all, Your Honor, they do not. It's an apartment. They rent an apartment.

But again, that's outside the – all we can look at are the four corners of this complaint, and we can get to that issue at class certification.

However, Judge, I can represent to you, based upon what Mr. Burt has advised me, that they rent an apartment and are therefore ineligible for any kind of homestead exemption. But we can probably get into some of that when we discuss maybe the commerce clause argument.

Further, Judge, even though I don't think it's important in the wake of the Kuhnlein case, we are seeking both injunctive and declaratory relief.

This case is a facial challenge to the constitutionality of the tax exemption like the facial challenge in the Kuhnlein case, and I have – I'm sure opposing counsel is well familiar with the Kuhnlein case, but I have a copy for both Your Honor and opposing counsel.

In Kuhnlein the courts held that a refund – this [14] is the Florida Supreme Court – a refund claim based on alleged unconstitutionality of an impact fee assessed on state residents' used vehicles could be cast as a class action in any – and it went on to say that, "We do not believe that there is a requirement where you are making a facial constitutional challenge that the plaintiff apply for a refund."

And the Court went on to say that declaratory judgment was appropriate in a case challenging the facial constitutionality of a discriminatory tax. And the Court

also indicated that sovereign immunity is not a defense in this case, whether that sovereign immunity is applied through an application for refund or any of the other procedures. The Court said that sovereign immunity does not exempt a state from a challenge based on violation of the federal Constitution, because any other rule is self-evident and it would make the constitutional law subservient to the State's will.

Here's a copy of the Kuhnlein case, Judge.

And then last year in the Public Medical Assistance Fund against Hammerhoff case, a Florida First DCA case, in that case the appellants challenged the non-final order which certified the class for the purpose of a constitutional challenge to an [15] assessment. The court noted that in Kuhnlein, Florida residents challenged the facial constitutionality of a fee, and the State in that case contended that the class action was barred because none of the class representatives had applied for a refund. The Supreme Court expressly rejected that argument, and the Court went on to say that, quote, "We read Kuhnlein as creating an exception to the general rule established by Devlin against Dickinson and similar cases which require a party to first seek and be denied a refund before filing suit for a tax refund."

And in that case the appellants urged the First District to read a portion of Kuhnlein that referred to other procedural requirements as necessitating an application for and denial of a refund. The First District rejected that, saying, quote, "Such a reading, however, would fly in the face of the clear holding in Kuhnlein that fulfilling the

state's refund procedures is not a condition precedent to bringing a constitutionally based refund action."

And then in Herrera against City of Miami, which is cited in our memorandum, the Court said that Section 194.171, Florida Statutes, does not apply to this case because appellants are not contesting a tax [16] assessment.

We are not contesting a tax assessment in this case, Judge. This is a facial challenge to a real estate tax exemption. Defendants rely on two cases, Judge. One is the Herzog case, which is a Florida Circuit Court case decided in March of 1997. That was decided two months before the Camps Newfound Alatana case. Judge, we didn't cite either Kuhnlein or Camps Newfound in our memorandum, which we delivered to your office, I believe it was on Tuesday, because – either Tuesday or Wednesday – because the Defendants had not raised any – had not raised the substantive constitutional arguments that they raised in their memorandum, which I received by facsimile Wednesday afternoon.

In the Herzog case, which they rely on for saying that there is no constitutional basis for this action, that was decided two months before the Camps Newfound Alatana against Harrison case.

They also rely on a case called Reuben, which is a New Jersey Supreme Court case decided 15 years ago. Again, that was – it's an old case and it was decided, again, before the Camps Newfound Alatana against Harrison case.

Here's a copy of this. I'd like to read some [17] pertinent portions to Your Honor, and here is – and I'll pass them to opposing counsel.

Your Honor, the Camps Newfound case requires that all courts I think look at the validity of homestead tax exemptions. That case held that states may not impose real estate taxes in a manner that discriminates against interstate commerce or that discriminates based upon the residency of persons using the property which is the subject of the taxation.

In that case, the United States Supreme Court in language that is – well, it wasn't addressing a homestead exemption, it was addressing property tax exemptions. They stated, and this is on page 863, which is before Your Honor, if we go to the bottom right corner, I've highlighted it. "The town argues that the dormant commerce clause is inapplicable because a real estate tax is at issue. We disagree. The tax on real estate, like any other tax, may impermissibly burden interstate commerce. We may assume, as the town argues, that Congress could not impose a national real estate tax. It does not follow that states may impose real estate taxes in a manner that discriminates against interstate commerce.

"The state's power to levy and collect taxes, [18] comprehensive and necessary as that power is, cannot be exerted in a way which involves discrimination against interstate commerce. To allow a state to avoid the strictures of the dormant commerce clause by the simple device of labeling its discriminatory tax or levy on real estate would destroy the barrier against protectionism that the Constitution protects against. Yet, were the

town's theory adopted, the state could adopt such a tariff with ease."

And then going on, the Court talked, on page 865, about avoiding economic Balkanization and retaliatory acts of other states that may follow, and it indicated, quote, "Of course, this case does not involve a total prohibition." This is on page 866. "Rather, the statute provides a strong incentive for affected entities not to do business with non-residents if they are able to so avoid the discriminatory tax."

And, "That the discrimination comes in the form of a deprivation of a generally available tax benefit rather than a specific penalty is of no moment."

And the Court goes on to say, "For over 150 years states have rightly concluded that the imposition of a differential burden on any part of the stream of commerce is invalid."

[19] And then on page 868 to 869, the Court goes on to discuss some of these problems.

Again, Judge, this is not a challenge to an assessment. Most of the cases cited by the Defendants involve challenges to assessments. This is not a challenge to a denial of an exemption. This 'is almost directly on fours with the Kuhnlein case, which is also a commerce clause decision. And it's not a challenge to any Defendant official who can provide Plaintiffs with any remedy administratively. Plaintiffs are simply ineligible for the challenged exemption.

If I may turn the class action argument over to Mr. Burt.

MR. BURT: Your Honor, on the issue of class action, not to beat a dead horse, but it seems to us that the Florida Supreme Court Kuhnlein opinion also dispenses with the Defendant's argument here that this case can't properly be a class action. The exact argument was made there by the State, that you couldn't possibly have a class action based on a refund claim, and the Court rejected that on page 717 of 646 So.2d, which I think Your Honor has in front of him, where the Court said, "Any constitutional claim affecting a class of persons can be the proper subject [20] of a class action, provided other procedural requirements are met as they were here."

We think that deals directly with their argument and recognizes the fact that this not just a proper action, but a proper class action as well.

MR. GREEN: And Your Honor, again, the Herzog case, which is the one that it was attached to the Defendant's motion to dismiss, a southwest Florida state circuit court case, did not address the commerce clause issue, and in any event, the U.S. Supreme Court made its pronouncement two months after that decision in the Camps Newfound case which Your Honor is reading right now.

THE COURT: Yes, but now Camps Newfound is a totally different taxing scheme and has the potential for interfering with interstate commerce. I'm wondering what the interstate commerce implications of the exemption are.

MR. GREEN: Very briefly, Judge –

THE COURT: In view of the fact that states have had them since the '30s.

MR. GREEN: Well, the states have had discriminatory taxes. Actually, countries have had discriminatory taxes for, you know, millennia.

One of the purposes of the commerce clause was to [21] prevent economic Balkanization, prevent the discriminatory taxes based upon residency or permanent residency.

The U.S. Supreme Court has taken a very – the Camps Newfound case was a real estate tax, and the Court has, in the last 10 or 15 years, taken an extremely broad view of what constitutes commerce within the meaning of the commerce clause. It applies to the movement of labor.

I had a case, the worker I.D. case in Palm Beach, where the Court held that moving – bringing servants from Chicago down to Palm Beach constituted the interstate movement of labor. That was the Wallace against Town of Palm Beach case.

Here we're talking about the purchase of real estate property, investing in real estate in Florida. That certainly constitutes commerce within the meaning of the – within the broad meaning of commerce under the dormant commerce clause.

Again, Camps Newfound was a real estate tax, and the Court emphasized, just because it's a real estate tax doesn't remove it from the protection of the commerce clause.

And also, if we look at part three of the Court's opinion there, it says, quote, "The attendance of [22] campers," even for two weeks – one week to four weeks, "necessarily generates the transportation of persons across state lines that has long been recognized as a form of commerce."

I'll give you – I'm reading from the – Judge, that is the – so the movement of Plaintiffs –

THE COURT: Yes, it says, "We are not persuaded the town's argument that the dormant clause is inapplicable because campers are not," quote, " 'articles of commerce,' " close quote, I read that.

MR. GREEN: And we allege in the complaint that our clients' travel to Florida involved the renting of the property. That's –

THE COURT: Okay. Any rebuttal argument?

MR. MELLICHAMP: Yes, Your Honor, just a few things.

One on, if the Court will refer to page 5 and 6 of our motion to dismiss, all raise subject matter jurisdiction, the inability to use Chapter 86. It cites the very cases that we cite in our memorandum, the Stafford case, the Ray Construction Case, the Horne case, the Macadamia Housing case. So none of this came as a big surprise.

The second thing, and I will get to the U.S. Supreme Court in a moment, the Hammerhoff case is not [23] a Florida Supreme Court case, it's a First District case, and it's pending review – or pending opinion from the Florida Supreme Court case, and it's based on Kuhnlein and

Kuhnlein has a very important phrase in it that the Plaintiffs have referred to.

In Kuhnlein it was an excise tax and the statute that controls obtaining a refund on excise taxes is 215.26, which has a five-year statute of non-claim. The Kuhnlein action was brought well within that period, and as the Court pointed out in its opinion, and I quote it again, "Any constitutional claim affecting a class of persons can be a proper subject for class action provided other procedural requirements are met," as they were here. This is completely in line with the Hirsch case where the procedural requirements were not met.

For ad valorem tax purposes, that period is 60 days, not five years, and none of that has been met, and what they want is a refund.

Now, I would submit to the Court that the main case is a very interesting case, and if I ran a summer camp in a state that had a taxing scheme like that, I would either be happy about it or sad about it depending on which side of the road I was on, but the United States Supreme – and the camp is a commercial [24] enterprise, and they cite the basis for their opinion is a Heart of Atlanta Motel case, which the Court is probably familiar with.

I think the case that controls, or would ultimately control if we were dealing with the merits today, the outcome of this case is the Nordlinger versus Hahn case, which was provided to the Court. It's at 505 U.S. 1.

In that case they dealt with a Prop 13 in the state of California, which deliberately set up disparities in value

that the Court said were wildly distorted, but were constitutional. They were dealing with homes. It was constitutional and didn't interfere with the equal protection. The classification was rationally furthered a legitimate state interest, which in this case is the preservation of families, not the preservation of summer camps.

And I would submit that that case controls the outcome or has a great impact on the outcome of this case, because I am assuming from their complaint the Plaintiffs are concerned that the first $25,000 of their property is not exempt, whereas in California if you had been a resident in the state for 15 years – or 10 years, which is almost like durational, your property value would be very low, and if you were the [25] Plaintiffs and you moved there or went there to buy a house, are a resident from Chicago and you bought a house, your taxes would be way up here in the same neighborhood.

The U.S. Supreme Court said they didn't see anything wrong with that, and the purpose for that one was preserving neighborhoods. The purpose of the Florida exemption is to preserve the family home.

The other thing is, the homestead in Florida only allows one homestead, whether you live in Florida all the time or whether you don't, and it doesn't require that you live here any length of time to get this homestead exemption. And if you – in Florida if you have five homes and you live here full time, you get homestead on only one.

The Plaintiffs, from the allegations in this complaint, you know, could apply to Florida or they could not. It's up to them. But I feel that there is no discrimination. We treat citizens of other states just the same as we treat

them here. You can only have one, and it even says if you have one someplace else, you can't have one here. But it still involves, in this particular motion the procedural requirements that the Supreme Court talks about in Kuhnlein have not been met, because the underlying part of this case [26] is they want the money back. And it's an ad valorem case, and if they wanted their money back they should have challenged the assessment within 60 days of when they got it in any one year that they got the tax bill. Nothing they say gets around that. All the cases that have been cited stress you've got to meet the procedural requirements. They haven't met them. It's just that plain and simple.

THE COURT: Let me ask you, Mr. Green, why haven't they filed for a homestead exemption here?

MR. GREEN: Because they're not eligible.

THE COURT: Well, I'm not sure they are not.

MR. GREEN: They say that they are ineligible and cannot – indicate that they are permanent – they are not a permanent resident or they are not domiciled here.

THE COURT: I'm going to grant the motion to dismiss. I don't think they've got standing under Kuhnlein and those other cases. I think you may have picked the wrong plaintiff, if they don't own property in Illinois. People are allowed under this constitutional provision, and I assume under Illinois, to have one homestead. If they are renters, and I know this is a factual thing that may not be set forth, but if they don't own property there, it seems [27] to me they could apply and declare this as their residence.

MR. GREEN: They may be entitled to homestead debt protection in Illinois, and that would – Judge, they are not prepared to say that Florida is their permanent residence. We've got to look at the four corners of the complaint, Judge.

THE COURT: Yes, they may have pled themselves on a court, too.

MR. MELLICHAMP: Your Honor, they did say in paragraph 11 of the complaint that they are not full-time residents of Florida. They out and out plead that. It says in the second sentence, "Plaintiffs are the owners of Florida residential real estate, but are not full-time Florida residents."

MR. GREEN: And they also indicate that they are ineligible, and I think Your Honor has, at least for the purposes of the motion to dismiss, has to take those allegations as correct.

THE COURT: Let me ask, do both agree that this case can go out on a motion to dismiss with prejudice? I mean, I don't want it coming back here just because I didn't do it on summary judgment. This is going to end up in the U.S. Supreme Court and they're going to decide it, whoever is on it, by the time it gets [28] there.

MR. BURT: I think it can go out on that, Your Honor, because Plaintiff says it's facial, and –

THE COURT: Yes, that's what I think, too.

Let me say this. I agree that they have alleged that they are residents of Illinois and therefore they do not feel that they can, under the statutory or constitutional

scheme that Florida has that they can apply for it. They're just saying that it's unconstitutional tax, based upon a violation of the commerce clause, so I will rule that they do have standing.

I'm going to also rule that the statute is facially constitutional. I don't think it impacts the commerce clause, and just leave it at that and let the Supremes do what they're going to do and let the Big Supremes do what they're going to do.

I haven't studied, but I have read over this Camps Newfound case. I don't think it's applicable to this type of a taxing scheme. That's an exemption that is very clearly involved with commerce. The fact that a lot of people have second homes in Florida, I don't think that's the same thing. I think the State can – and all states, and it's not a retaliatory, almost all the states have homestead exemption [29] statutes, so we're not talking about a retaliatory tax. It's not preventing people from coming down here. The Court can take judicial notice from living here for the last 47 years that it doesn't seem to be impinging on anybody's decision to move to Florida or to establish a second home in Florida.

But the – I guess what I'm saying is that the facts of the Camps Newfound case are far, far different. I realize it's an ad valorem tax exemption on this camp, but I'm going to find that the statute is facially constitutional – I mean, excuse me, the constitutional provision is facially constitutional under the commerce clause, and that's where the attack it, and this case, this looks to be – I don't know why it's got '80. Yes, this Herzog case that was done in, I think, Naples is an '87 case, I mean, it's 11

years old, and I don't know if anybody appealed it or what have you.

MR. MELLICHAMP: It is per curiam, without opinion, Your Honor.

THE COURT: And I understand it predates this Camps Newfound case as well.

But I don't think that a constitutional analysis of this particular constitutional -- or this particular provision of Florida's Constitution in my [30] judgment is not violative of the commerce clause of the United States Constitution, and I realize we get into this federal versus states balancing business, but based upon that I'll just enter a – I'll dismiss the complaint with prejudice on those grounds.

I don't think there's other – I tend to agree with the Plaintiffs, I don't think there's really procedural grounds that sends the case out, so I think that the Plaintiffs, in preparing their amended complaint, have squarely placed the facial constitutional validity of this provision of the Florida Constitution before the Court, and in that instance this Court then must decide that issue, and I basically am deciding that it is facially constitutional.

So I'll dismiss it with prejudice, keep my fingers crossed that they don't want to send the case back here to have it done on some sort of summary judgment. I'll just state for the record, I don't believe there's really any factual dispute. It's a pure question of law, and whether it goes out on a motion to dismiss with prejudice, which is of course a final order that's appealable, or whether it goes out on a final summary judgment, there's no real

distinction there legally, and counsel can either take [31] it to the First DCA or to the Supremes if they'll take it.

But I'll, as my esteemed colleague, Judge Hall, says, I'm just a constitutional way station on to bigger and better and brighter courts. In any event, I'll make that ruling and hasten the case on to its ultimate conclusion in – three blocks over or in Washington.

MR. BURT: Okay. Thank you, Judge.

THE COURT: All right. Thank you all very much.

(Whereupon, the proceedings were concluded at 9:50 a.m.)

[32] CERTIFICATE

STATE OF FLORIDA)

COUNTY OF LEON)

I, ELIZABETH KICKHAM, Court Reporter at Tallahassee, Florida, do hereby certify as follows:

THAT I correctly reported in shorthand the foregoing proceedings at the time and place stated in the caption hereof;

THAT I later reduced the shorthand notes to typewriting, or under my supervision, and that the foregoing pages 3 through 31 represent a true, correct, and complete transcript of said proceedings;

And I further certify that I am not of kin or counsel to the parties in the case; am not in the regular employ of

counsel for any of said parties; nor am I in anywise interested in the result of said case.

Dated this ___ day of ___, 1998.

ELIZABETH KICKHAM

Court Reporter